Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GERALD G. RUBUSH and PHYLLIS C. RUBUSH,

Petitioners,

vs.

BEMIS COMPANY, INC., and WABASH PRODUCTS, DIVISION OF BEMIS COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED

1. Whether the failure of the Supreme Court of Indiana to afford petitioners the benefit of established procedures under State law rendered the proceedings by such Court so fundamentally unfair or so fundamentally deficient that they are inconsistent with the rudimentary demands of fair procedure and violative of petitioners' rights to due process under the Fourteenth Amendment.

2. Whether the failure of the Supreme Court of Indiana to afford petitioners the benefit of established procedures under State law rendered the proceedings by such Court so fundamentally unfair or so fundamentally deficient that they are inconsistent with the rudimentary demands of fair procedure and violative of petitioners' rights to equal protection of the laws under the Fourteenth Amendment.

3. Whether the denial by the Supreme Court of Indiana of petitioners' rights to a jury trial of their vested causes of action was a violation of petitioners' rights to due process of law and/or equal protection of the laws under the Fourteenth Amendment.

4. Whether the Supreme Court of Indiana deprived petitioners of their rights to due process of law and/or equal protection of the laws under the Fourteenth Amendment by vacating the Opinion of the Court of Appeals of Indiana and ordering the trial court to enter Judgment for respondents, where such Supreme Court Opinion misstates the record, bases its Opinion on an incorrect statement of the record, and contravenes (without overruling) its established precedents of appellate review.

5. Whether the application of the "open and obvious rule" by the Supreme Court of Indiana to petitioners in such a manner as to deprive them of a jury trial because petitioner Gerald G. Rubush was injured on an unguarded machine rather than a guarded machine deprived petitioners of the equal protection of the laws under the Fourteenth Amendment.

6. Whether the application of the "open and obvious rule" by the Supreme Court of Indiana to Petitioners in such manner as to deprive them of a jury trial because petitioner Gerald G. Rubush was injured on an unguarded machine rather than a guarded machine deprived petitioners of the due process of law under the Fourteenth Amendment.

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Indiana are contained in the caption.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

GERALD G. RUBUSH and PHYLLIS C. RUBUSH,

Petitioners,

vs.

BEMIS COMPANY, INC. and WABASH PRODUCTS, DIVISION OF BEMIS COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO
THE SUPREME COURT OF INDIANA

The petitioners Gerald G. Rubush and Phyllis C. Rubush respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the Supreme Court of Indiana entered in this proceeding on November 12, 1981.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana is reported at 427 N.E.2d 1058 and appears in the Appendix, as does the Court of Appeals' Opinion, which is reported at 401 N.E.2d 48. The official reports are not available. The Supreme Court's Denial of Rehearing without Opinion is in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on November 12, 1981. A timely Petition For Rehearing was denied on February 10, 1982, and this Petition For Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND RULES OF PROCEDURE

Because of their length the following Constitutional Provisions and Procedural

Rules are set forth in the Appendix:

United States Constitution, Fourteenth Amendment, Section I;

Constitution of State of Indiana, Article I, Section 20;

Rule 1, Indiana Rules of Appellate Procedure;

Rule 15(N), Indiana Rules of Appellate Procedure;

Rule 1, Indiana Rules of Trial Procedure; and

Rule 50, Indiana Rules of Trial Procedure.

STATEMENT OF THE CASE

A.

Course of Proceedings Below

This was a civil action filed by Gerald G. Rubush and Phyllis C. Rubush (Petitioners herein) for personal injuries sustained by Gerald G. Rubush against Bemis Co., Inc. and Wabash Products, Division of Bemis Company, Inc., at his place of employment, the Johns-Manville plant in Richmond, Wayne County, Indiana.

The Rubushes proceeded against respondents on the theory of strict liability in tort as set forth in §402(A) of the Restatement of Torts, Second, and claimed that the respondents' product, a batt packer, or fiber glass packaging machine, was defective for its intended use and was unreasonably dangerous, and that petitioners had been proximately damaged as a result of such defective and unreasonably dangerous condition. Rubushes' Specification of Defects were set forth in a pleading filed with the Court pursuant to the Court's Order at a Pre-Trial conference held on January 21, 1977. Such Specification of Defects was incorporated in the Court's Pre-Trial Order on February 2, 1977. A copy of the Specification of Defects in contained in the Appendix.

The trial was commenced on February 14, 1977 in the Hancock County Circuit Court. On February 25, 1977 the Jury re-

turned a verdict for plaintiffs Gerald G. Rubush and Phyllis C. Rubush and against the defendants Bemis Company, Inc. and Wabash Products, Division of Bemis Company, Inc. (both hereinafter referred to as "Bemis"), and assessed Gerald G. Rubush's damages at Seven Hundred Fifty Thousand Dollars ($750,000) and assessed plaintiff Phyllis C. Rubush's damages at Twenty-Five Thousand Dollars ($25,000). On February 25, 1977 the trial court rendered judgment in accordance with the Verdict. Bemis then filed a timely Motion To Correct Errors, which was denied. Bemis then appealed to the Court of Appeals of Indiana, which Court affirmed the judgment in favor of Gerald G. Rubush and reversed the judgment in favor of Phyllis C. Rubush on damages only. A new trial for Phyllis was ordered on damages because of the trial court's instruction to the Jury with respect to the law dealing with damages for loss of con-

sortium, in that there had been a divorce between the time of injury and the time of trial.

The Opinion of the Court of Appeals of Indiana, First District, was unanimous. A copy of the Opinion of the Indiana Court of Appeals is contained in the Appendix hereto.

Respondents filed a timely Motion For Rehearing, which was denied by the Court of Appeals and Respondents then filed a Petition To Transfer the cause to the Supreme Court of Indiana.

The Court granted transfer and decided the Appeal adversely to Petitioners in a 3-2 Majority Opinion, filed on November 12, 1981. In that Opinion, the Court vacated the unanimous opinion of the First District Court of Appeals which had affirmed the Jury Verdict and Judgment below. In its Majority Opinion, the Court not only reversed the Judgment, but also

directed the trial court to enter Judgment in favor of Bemis as a matter of law. A copy of the Opinion of the Supreme Court of Indiana is contained in the Appendix hereto.

Petitioners filed a timely Petition For Rehearing, a copy of which is contained in the Appendix hereto, which was, on February 10, 1982, denied without opinion by the same Majority of the Court with two members dissenting. Pursuant to the direction of the Supreme Court of Indiana the trial court, on February 23, 1982, entered judgment as follows:

> "Comes now the Court and as directed by the opinion of the Supreme Court of Indiana, hereby enters judgment for the defendants Bemis Company, Inc., and Wabash Products, Division of Bemis Co., Inc. and against the plaintiffs."

B.

Raising the Federal Question

Petitioners prevailed in the trial court and in the Court of Appeals of Ind-

iana. It was the Indiana Supreme Court, in its Opinion which vacated the Opinion of the Court of Appeals and ordered the trial court to enter judgment against petitioners which petitioners contend deprived them of their federal constitutional rights to due process of law and equal protection of the laws.

Petitioners raised the federal question in their Petition For Rehearing, filed in response to the Opinion of the Indiana Supreme Court, which was the earliest opportunity petitioners had to raise such question.

The Petition For Rehearing appears in the Appendix in its entirety, but therein, Petitioners stated:

> "By summarily and arbitrarily depriving Phyllis and Gary Rubush of an opportunity to litigate their vested cause of action, the decision of the Court violated fundamental principles of due process and equal protection.
>
> Boddie v. Connecticut, (1971) 401 U.S. 371

Cf. Dague v. Piper Aircraft Corp. (1981) ___ Ind. ___, 418 N.E.2d 207"

In the Petition For Rehearing, Petitioners also directed the Court's attention to its contravention of previously well settled and controlling Indiana Rules of Appellate Review, controlling Indiana precedents, Indiana Trial Rule 50 and other grounds.

The February 10, 1982 ruling of the Supreme Court of Indiana was:

> "Appellee Petition For Rehearing is hereby Denied, without Opinion. Givan, C.J.
>
> DeBruler, J. dissents.
>
> Hunter, J.; I dissent for same reasons already expressed in my original Dissent."

C.

The Relevant Facts Necessary To A consideration of the Issues

The facts most favorable to the support of the verdict are as follows. On

October 19, 1971, Gerald G. Rubush (Gary), age 26, was working as a bagger on a fiber glass insulation batt packing machine called a batt packer, which was designed by Bemis Company, Inc. and Wabash Products, Division of Bemis Company, Inc. (both hereinafter referred to as Bemis). The batt packer was manufactured and sold by Bemis to Johns-Manville Corporation in 1969. While performing his work as a bagger on the batt packer and in the course of the batt packer's operation, Gerald G. Rubush was struck in the head by a moving part of the machine. This moving part was called a shroud, and it was a visible moving part of the batt packing machine. A blow to the head by the descending shroud caused Gerald G. Rubush's head to be punctured, driving skull fragments into his brain and causing an open head wound from which brain matter extruded. The temporal lobe portion of the brain

was severed and additional brain matter was later surgically removed due to the injury. Gary can no longer maintain normal sexual functions. He has suffered 52% loss of his visual system. He experiences petit mal and grand mal epileptic seizures. He has undergone drastic personality changes, and his physical and mental activities are limited.

The ultimate function of the batt packer was to pack batts of insulation into heavy paper bags. This was accomplished in two phases. The first phase was a compression phase, during which batts were vertically compressed into the compression chamber of the packer to the approximate size of the open end of the bag into which the batts were to be moved horizontally out of the compression chamber. The second phase was the bagging phase during which the bag was filled with compressed batts, which had been horizon-

tally pushed from the compression chamber to the shroud assembly area through a square opening in the base of the wall of the compression chamber, called the "bag spout". The bagger places the open end of the bag around the mouth of the bag spout and the bag is secured to the mouth of the metal bag spout by a bag clamp. The bag clamp is activated by a push button by the bagger after he places the bag over the mouth of the bag spout. When he pushes the bag clamp button, this not only activates the bag clamps and causes them to clamp, but initiates the process by which a 7-foot long metal shroud descends automatically. [(R. 1686: 12-25); (R. 1687: 23-25); (R. 1688: 1-8); (R. 1692: 7-9); (R. 1518: 9-13)]. Upon activation, the shroud, under power, descends in an arc to a horizontal position above the bag and the very end of the shroud slightly overlaps the bag spout. The

function of the shroud was to hold and to furnish support to the paper bag as it was being filled with batts to prevent the bag from being torn or ripped. When the operator is placing the bag over the chute or spout the shroud is behind and above him and his attention is directed downward and away from the shroud. In such position, when he depresses the bag clamp button he sees the clamp come into play, but not the movement of the shroud. [(R. 1245: Plaintiff's Exhibit No. 89); (R. 1686: 18-23)].

In the process of placing the bag on the bag spout, part of the operator's body, including his head, would be underneath the arc of the shroud. [(R. 1190: 22-25); (R. 1191: 1-3)]. The bag does not slide on easily. The operator has to tug it on the bag spout. [(R. 2358: 24-25); (R. 2359: 1-3)]. It is necessary in the normal operation for the operator to continue

to hold the bag until the bag clamp buttons have set, and in this process his hands are often in the area of the bag clamps and are possibly under the bag clamps. [(R. 1190: 1-9); (R. 1189: 16-19); (R. 1520: 2-3); (R. 1184: 13-24); (R. 1301: 22-25); (R. 1302: 1-23); (R. 1673: 5-25, 1-3); (R. 1674: 24-25); (R. 1675: 1-4)].

It was not only possible for the worker to have his hand in the area or under the bag clamp during the process of putting the bag on, but it was possible for him to have his hand underneath the bag clamp at the time he pushed the bag clamp button, causing the bag clamp to come down. [(R. 1474: 4-9); (R. 1514: 10-24); (R. 1515: 1); (R. 1301: 22-25); (R. 1302: 16-19)]. The bag clamp-spout and shroud area constitute a pinch point, which, if possible, should be guarded and this pinch point was not guarded. [(R. 2420: 22-24)

(R. 2420 15-17); (R. 2421: 3-4)]. It is not only a possibility that the worker will sooner or later get his hand caught under the bag clamp, but a probability. [(R. 1515: 15-19)]. The shroud comes down automatically and descends at an adjustable rate, with the normal range of 3 to 5 seconds. [(R. 1692: 7-9); (R. 1518: 12-13); (R. 1200: 23-25); (R. 1201: 1-7)]. There was no safety guard or automatic safety device which would prevent the shroud from striking the worker if he were either in the area due to the fact that his hand was caught in the bag clamp, or through inadvertence remained in or returned to the area without conscious realization of the fact that the shroud was descending. [(R. 1642: 23-25); (R. 1643: 1-8); (R. 1470: 12-25); (R. 1471: 1-25); (R. 1472: 1-11)]. Such devices were feasible and practical and inexpensive at the time of the manufacture of this batt

packer. Such guarding would not have hindered the operation of the machine. At the time of this incident, Gary got his hand caught in the bag clamps while operating the batt packer. [(R. 1133: 24-25); (R. 1134: 1-18); (R. 1149: 19-25); (R. 1150: 1-9); (R. 1229: 21-25); (R. 1230: 1-25); (R. 1231: 1-3); (R. 1295: 17-25)]. He suffered an injury to his hand and had residue from the bag clamps on his hand. The shroud struck Gary in the head causing brain matter and particles of the skull to be extruded onto the machine and the area. [(R. 1229: 21-25); (R. 1230: 1-2); (R. 1231: 1-3)].

At the time of his injury, Gary was operating the machine designed, manufactured and sold by Bemis, in a plant which operated on a 24-hour-a-day, 7-day-a-week and incentive pay basis. The batt packer was used on a process line in which speed and production were important. The job

was a monotonous one and in a monotonous job where you are doing the same thing over and over again, a monotony generates and things occur and they just happen, and you don't even realize they are happening. The only thing that the operator sees when he pushes the bag clamp button is the activation of the clamp, and then there is a delay period and the shroud comes down automatically. In a monotonous type of operation you can forget a fact that the shroud has been automatically operated and you can get yourself in difficulty. [(R. 1656: 1-6); (R. 1656: 7-13)].

The batt packer was not safe because the same button caused the bag clamps to clamp and the shroud to come down automatically. [(R. 1478: 12-21); (R. 1477: 2-25)]. There should have been a second button to activate the shroud which required the operator to be away from the machine when he pressed it so that the

shroud came down at the operator's control rather than automatically. [(R. 1656: 13-16)]. The fact that there was one button which activated the bag clamps and caused the shroud to come down automatically caused this accident. [(R. 1712: 9-22)]. Another defect in the machine that caused the injury was the ability of the shroud to come down while personnel were in the danger zone or in the sweep arc of the shroud. [(R. 1490: 19-25)]. The machine could have been guarded in a feasible manner for about $35.00. [(R. 1707: 9-21)].

The trial court's instruction regarding the so-called "open and obvious" concept was as follows:

FINAL INSTRUCTION NO. 8.

"If you find that the batt packaging machine in question was defective in that there was no guard system to prevent the shroud from descending upon a person who happened to be in the bag area and under the descending arc of the shroud, or that the said machine was defective in that

no adequate warning was given to a user of the machine to properly warn such person that a person inside the bag area and under the descending arc of the shroud was in danger of being struck by the descending shroud, the further fact, if you find it to be a fact, that such defective condition, if you find such condition to be defective, was open, apparent, and obvious to the user of the machine, would not necessarily and in and of itself deny recovery on a strict liability theory to a person injured thereby, if you find such condition to be defective and unreasonably dangerous. However, you may consider the fact, if you find it to be a fact, that such condition was open, apparent, and obvious to the user of the machine in determining whether or not the machine was in fact defective and unreasonably dangerous, and in determining whether or not the person working as a bagger on said machine, such as the plaintiff Gerald G. Rubush, voluntarily incurred the risk of injury from such condition."

REASONS FOR GRANTING THE WRIT

The Supreme Court of Indiana, by vacating the Opinion of the Court of Appeals of Indiana and ordering the trial court to enter judgment as a matter of law for respondents has denied petitioners

due process of law and equal protection of laws and such Opinion is in conflict with applicable decisions of this Court.

This case presents Federal Constitutional issues of substantial importance to not only petitioners, but others who may be injured on unguarded machines. If the Rule of this case is applied, such persons will be deprived of equal and fair protection of laws.

Under the decisions of this Court, when a State undertakes to provide a procedure for use by its citizens it must provide a fair procedure. When a State undertakes to implement a right it must do so in other than a sham fashion. This Court will scrutinize the procedure which is utilized to determine whether or not it grants to the citizen the fair process which is due him. It is more inimical to concepts of justice and of reasonable expectations to provide a remedy which is a

sham and lacking in real substance than it is to deprive of the remedy ab initio. The effect on the structure and vitality of a free society of deprivation of rights by tortured interpretations and misstatements of the record is incalculable. Fundamental concepts of fairness are offended by a procedure wherein, in addition to the trial judge, who has been elevated to the Court of Appeals of Indiana, eight Indiana Appellate Court Judges ruled upon this case. Five of the eight judges voted to affirm the judgment below. Three judges voted not only to not affirm, but to reverse as a matter of law. It was by this procedure that petitioners were deprived, not only of their judgment, but of the right to litigate their vested cause of action. On its face, such a procedure is not fundamentally fair, but is on its face, unfair. This result contravenes the holdings of this Court that to per-

form its high function in the best way "justice must satisfy the appearance of justice". In the matters of LeRoy Murchinson and John White, Petitioners, 349 U.S. 133 (1955).

The essential guarantee of the due process clause in the Fourteenth Amendment is fairness. When a State acts against a specific individual it must do so in a procedurally fair manner. This Court, in Boddie v. State of Connecticut, 401 U.S. 371 (1971), found that under the Fourteenth Amendment:

> "The State owes to each individual that process which, in light of the values of a free society, can be characterized as due."

This Court recognized that an otherwise valid action or rule of a state may be constitutionally invalid "as applied" when it operates to deprive an individual of a protected right. This Court struck down a rule which had the effect, in its application to indigents, of limiting access

to the state Courts. If the limitation of access initially is wrong then how much worse is it to deprive of meaningful access after the expense and trauma of successful trial and appeal.

This Court in Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18 (1981), again recognized the requirement of "due process" as "fundamental fairness" and that determination of what constituted "fundamental fairness" in a particular situation involves consideration of any relevant precedent and assessment of the several interests that are at stake. This Court stated that:

> "In its 14th Amendment our Constitution imposes on the states the standards necessary to insure that judicial procedures are fundamentally fair."

"Due process" has never been and perhaps never can be precisely defined. Its meaning is related to time, place and cir-

cumstances. Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18 (1981).

This Court has held that the federal guarantee of due process extends to State action through its judicial, as well as through its legislative, executive or administrative branch of government. Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673 (1930). Although it is for the State Courts to determine the adjective as well as the substantive law of the State, in so doing they must accord the parties due process of law. Whether acting through the judiciary or the legislature a State may not deprive a person of all existing remedies for the enforcement of a right which the State has no power to destroy. Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673 (1930).

This Court has held that in proper

cases it must review the evidence to make certain that constitutional principles have been constitutionally applied and indeed must "make an independent examination of the whole record". New York Times Company v. Sullivan, 376 U.S. 254 (1964); Whitus v. State of Georgia, 385 U.S. 545 (1967); Napue v. People of the State of Illinois, 360 U.S. 264 (1959); Ashcraft v. State of Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940); Niemotko v. State of Maryland, 340 U.S. 268 (1951). This is particularly true where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it, or when a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the federal question to analyze the facts. Fiske v. Kansas, 274 U.S. 380 (1927); Sterling v. Constantin,

287 U.S. 378; Creswill v. Grand Lodge K. P., 225 U.S. 246 (1912). Indeed, this Court has the duty to decide for itself facts or constructions upon which federal constitutional issues rest. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954). To the same effect, Craig v. Harney, 331 U.S. 367 (1947); Merchants National Bank of Richmond v. City of Richmond, 256 U.S. 635 (1921); Norris v. State of Alabama, 294 U.S. 587 (1935).

This Court has granted certiorari to review matters of evidence where the decisions are shockingly wrong and thus present substantial due process questions. Thompson v. City of Louisville, 363 U.S. 199 (1960); Garner v. Louisiana, 368 U.S. 157 (1961). Also this Court, in Creswill v. Grand Lodge Knights of Pythias of Georgia, (1912), held that where a Federal right has been denied as the result of the finding of fact, which it is contend-

ed there was no evidence whatever to support and the evidence was in the record, the resulting question of law was open for decision. This Court has reversed on the basis of lack of evidence in Vachon v. New Hampshire, 414 U.S. 478 (1974); Johnson v. Florida, 391 U.S. 596 (1968); Harris v. United States, 404 U.S. 1232 (1971).

In the instant case, the conclusion of law of the Indiana Supreme Court is so intermingled with its misstatement of the record which served as a basis for its opinion and its direction to the trial court to enter judgment for the respondents, that it is necessary for the Court to analyze the facts in order that an appropriate enforcement of Petitioners' rights under the 14th Amendment might be protected. The action of the Indiana Supreme Court was in fact, in its application to these petitioners, an extinguishment of their vested rights.

The federal question was raised by petitioners at their first opportunity, inasmuch as they had prevailed at the trial and intermediate appellate court levels. The very question of the denial of petitioners constitutional rights arose for the first time in the Court's opinion vacating the opinion of the Indiana Court of Appeals. Petitioners in their Petition For Rehearing raised the question. The action of the Indiana Supreme Court in ordering the trial court to find for the respondents as a matter of law was an unexpected decision which gave petitioners no prior opportunity to anticipate or assert the particular federal question until the Petition For Rehearing. Under the decisions of this Court, this constitutes a timely raising of the substantial federal question in the state Court, Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673 (1930), notwithstanding

the summary denial of petitioners' Petition For Rehearing without expressly addressing the federal question. Great Northern Railway Company v. Sunburst Oil & Refining Company, 287 U.S. 358 (1932); State of Missouri ex. rel Missouri Insurance Co. v. Gehner, 281 U.S. 313 (1930); Street v. State of New York, 394 U.S. 576 (1969); People of the State of New York ex rel. George W. Bryant v. Zimmerman, 278 U.S. 184 (1928); Rogers v. Alabama, 192 U.S. 226 (1904).

A consideration of the record below will disclose that the action of the Indiana Supreme Court, in reversing and ordering Entry of Judgment as a matter of law, was such an unexpected decision and such a departure from permissable action under existing precedents that petitioners had no prior opportunity to anticipate or assert the federal question.

Petitioners had no reason, based upon

the record of the proceedings or applicable precedents, to anticipate an order to the trial court to enter judgment for respondents.

Article I, Section 20 of the Constitution of the State of Indiana provides that the right of trial by jury in civil cases shall remain inviolate.

In interpreting the role of an Appellate Court the Court of Appeals of Indiana, in Stidd v. Dietz, 192 N.E.2d 651 (1963), discussed the import of Article I, Section 20:

> "Under this constitutional provision, a Court of Appeal cannot weigh the evidence and substitute its finding of fact for the facts as found by the Jury."

Therein, the Court found the applicable rule to be that the decision of the trial court will be set aside as contrary to law only if the evidence is without conflict and can lead to but one conclusion, and the trial court has reached an

opposite conclusion.

The Supreme Court of Indiana in City of Terre Haute v. Deckard, 183 N.E.2d 815 (1962) held that the parties in an action in tort for damages were entitled by the Indiana Constitution to a trial by jury.

In Novak v. Chicago and Calument District Transit Company, 135 N.E.2d 1 (1956), the Indiana Supreme Court reversed a judgment based on a verdict directed by the trial court against the plaintiffs in an action for a wrongful death. The Court reiterated the established rule concerning propriety of directed verdicts, and the circumstances under which such could be given. However, more importantly, in discussing the rule, the Court stated the following:

> "The rule above stated is grounded upon the fact that Article I, Section 20 of the Constitution of Indiana guarantees that, 'in all cases, the right of trial by jury shall remain inviolate'. Therefore, if there is any evidence

> of probative value in support of the necessary issues drawn in the case, it is the constitutional right of the complaining party, in cases triable by jury, to have a jury determine the credibility of the witnesses and the weight that shall be given the evidence, and to decide the facts accordingly. ..."

The Court then discussed the duty of the trial judge "who also saw the witnesses and heard the evidence from their lips on proper motion to order a new trial of the cause" where the verdict is against the clear preponderance of the evidence. In discussing the trial court's responsibility in this respect the Supreme Court said:

> "The signal importance of this duty is emphasized by the fact that when the trial court fails to see and measure up to this responsibility the party offended is shouldered with an injustice from which he, under our system of jurisprudence, has no appeal, for this Court, which does not have the opportunity of observing the demeanor of witnesses upon the witness stand, cannot assume the responsibility of determining the credibility of the witnesses or of weighing the evidence in the light of the conflict in their testimony.

> Thus it is that a complaining party, whose case is supported by some evidence or probative value upon every material issue, is given the benefit of his constitutional guarantee to have the right which he asserts finally affirmed or denied by a qualified and impartial jury..."

At the time that the Indiana Supreme Court entered its opinion and ordered the trial court to enter judgment for respondents, it was the law in Indiana, under established Rules of Appellate Review, that every reasonable presumption, inference and intendant must be indulged in favor of a Jury's general verdict. Shipley v. City of South Bend, 372 N.E.2d 490 (1978); Mutual Benefit Health & Accident Insurance v. Keiser, 14 Ind. 472, 14 N.E. 2d 707 (1938); Central Union Tel.Company v. Fehring, 146 Ind. 189, 45 N.E.2d 64 (1896). In determining whether a jury's verdict was contrary to law, the reviewing court could consider only that evidence most favorable to appellee. Blais-

ing v. Mills, 374 N.E.2d 1166 (1978); DeArmond v. Carter, 134 N.E.2d 239 (1956); New York Central Railway Company v. Thompson, 21 N.E.2d 625 (1939). It is presumed that jurors are intelligent persons who perform their duties in passing upon conflicting evidence accepting that construction of a witness' testimony which tends to support the verdict and rejecting evidence unfavorable to the verdict. New York C. & St. L.R. Company v. First Trust and Savings Company, 153 N.E. 761 (1926); Indiana Steel and Wire Company v. Studes, 119 N.E.2 (1918); Standard Oil Company v. Bowker, 40 N.E. 129 (1895). The Courts on appeal will not weigh conflicting evidence, since it is for the jury in the trial court to determine the weight of the testimony. Marion Trucking Company v. McDaniel Freight Lines, 108 N.E.2d 884 (1952); Baltimore and Ohio Railway Company v. Applegate, 150 N.E. 794 (1926); Cole

Real Estate Corp. v. Peoples Bank & Trust Co., 310 N.E.2d 275 (1974); Lake County Title Co. v. Root Enterprises, Inc., 339 N.E.2d 103 (1975). The Appellate Court must accept the facts as found by the trier of facts, if there is any evidence of probative value to sustain them. Harris Builders, Inc. v. Kopp, 311 N.E.2d 841 (1974). The reviewing court considers the evidence only to decide whether it is sufficient to support the finding and will not weigh the evidence to determine if there is any evidence or any legal inference which may be drawn therefrom, which if believed by the trier of facts would sustain the verdict or a decision. Orange-Co., Inc. v. Brown, 393 N.E.2d 192 (1979); Reynolds v. Meehan, 375 N.E.2d 1119 (1978); Bureau of Motor Vehicles v. Pentecostal House of Prayer, Inc., 380 N.E.2d 1225 (1978); Magnavox Ft. Wayne Employee Credit Union v. Benson, 331 N.E.2d 46 (1975);

Driscoll v. Sullivan, 115 N.E. 331 (1917).

The Supreme Court of Indiana, in the 1977 case of Huff v. Travelers Indemnity Company, 363 N.E.2d 985 (1977), had occasion to consider the appropriate role of a trial court in considering a Motion For Judgment On The Evidence subsequent to the Jury's verdict. The trial court had granted a Motion For Judgment On The Evidence to the defendant, after plaintiff had been successful in a jury trial. In reversing the trial court's granting of the Motion For Judgment On The Evidence, the Indiana Supreme Court said:

> "When the trial court is considering a Motion For Judgment on the evidence, subsequent to the jury's verdict, it must view only the evidence favorable to the non-moving party and the reasonable inferences to be drawn from that evidence. The trial court may enter judgment only if there is no substantial evidence or reasonable inferences to be adduced therefrom to support an essential element of the claim, i.e. the evidence must point unerringly to a conclusion not reached by the jury. ...

> If there is relevant evidence which supports the verdict, then the motion may not properly be granted because the evidence which supports the verdict is sufficient evidence and the final determination is left to the fact finder. This is not the scintilla rule. A scintilla is by definition barely perceptible and would not support a reasonable inference. ..."

In Berkholder v. Sandock, 413 N.E.2d 567 (1980) the Supreme Court of Indiana held that it was its function upon appeal, where sufficiency of the evidence was raised, to determine if there was substantial evidence of probative value to support the judgment based on an examination of the evidence most favorable to the party that prevailed below together with the reasonable inferences therefrom.

This Court has held that "maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be carefully

scrutinized." Dimick v. Schiedt, 293 U.S. 474 (1935). This Court has consistently refused to permit Appellate Courts to re-weigh the evidence and set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. Gallick v. Baltimore & Ohio Railway Company, 372 U.S. 108 (1962); Wilkerson v. McCarthy, 335 U.S. 53 (1949); Paris v. Pennsylvania Railroad Company, 361 U.S. 15 (1959); Tiller v. Atlantic Coastline R. Company, 318 U.S. 54; Tennant v. Peoria & P.U.R. Company, 321 U.S. 29; Washington and Georgetown R. Company v. McDade, 135 U.S. 554; Rodgers v. Missouri Pacific Railway Company, 352 U.S. 500 (1957). Likewise, in non F.E.L.A. cases, Dick v. New York Life Insurance Company, 359 U.S. 437 (1959); Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959); Gibson v. Phillips Petroleum Company, 352 U.S.

874 (1956).

This Court in Tennant v. Peoria & P.U.R. Company, 321 U.S. 29 (1944) articulated the classic difference between the function of a reviewing Court and of the Jury:

> "It is not the function of a Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. ...That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

This Court, in Wilkerson v. McCarty, 336 U.S. 53 (1949), in considering arguments advanced by the Utah Supreme Court to support its finding that petitioner was negligent and that the railroad was not, with great decisiveness stated that:

> "The arguments made by the State Supreme Court are relevant and appropriate only for consideration by the jury, the tribunal selected to pass on the issues."

The arguments made by the Indiana Supreme Court were relevant and appropriate only for consideration by the jury, the tribunal selected to pass on the issues. Under the Rule of this Court in Tennant, it was not the function of the Indiana Supreme Court to search the record for conflicting circumstantial evidence in order to take the case away from the Jury.

Under the decisions of the Supreme Court of Indiana and the Court of Appeals of Indiana, and the established Rules of

Appellate Review, the petitioners had every right to expect that the Supreme Court of Indiana would not weigh the evidence; would not make decisions with respect to the credibility of witnesses; would not disregard the testimony of expert witnesses who testified on behalf of petitioners; and would not misstate the record in order to substantiate an opinion reversing the judgment below as a matter of law, thus extinguishing petitioners' vested rights in violation of not only the 14th Amendment of the United States Constitution, but of Article I, Section 20 of the Indiana Constitution. Petitioners clearly had the reasonable expectations that, under no circumstances would they be deprived as a matter of law of the fruits of the jury's verdict and the trial court's judgment. Under the worst of circumstances petitioners had the reasonable expectations that should the Supreme Court

of Indiana not approve of the instructions on the so-called "open and obvious" issue, that the case would be remanded for a new trial consistent with proper instructions. The enormity of the error of the Supreme Court of Indiana in ordering judgment as a matter of law for the respondents can only be understood by an examination of the record. The opinion of the Court misstates the record to such an extent that a fair examination will not support the Court's findings. Petitioners have set forth in the Statement of The Case a fair summary of the evidence. It is however, necessary here to briefly discuss some of the more blatant misstatements to see the impropriety of the Court's final disposition.

In its Opinion, at page A-9 in the Appendix, the Court says:

> "Appellees admit that the descent of the shroud was an open and obvious danger which was well known

> to the operators of the machines, which would be obvious to anyone observing the machine."

This is an incorrect statement without foundation in the record. It was consistently petitioners' theory that within its expected and actual environment of use the batt packer was defective and unreasonably dangerous because the defects were not open and obvious in the machine's actual operation. It was plaintiff's theory that in determining whether or not a product is defective and unreasonably dangerous because of design deficiencies one must consider not only the physical characteristics of the product, but its intended use and its expected environment of use. It was petitioners' position that in determining whether or not a product is reasonably safe for its intended use, it is critical to look to the time of its use by an employee who was working in an atmosphere in which production and

speed are important, and in which incentive pay is in effect, rather than after the fact, with the luxury of reflective hindsight. One must consider not only production schedules, but also the facts of industrial life and the monotony and repetitiveness of a factory worker's job.

Absolutely contrary to the Court's statement, it was consistently petitioners' position that the "danger" was latent, and not open and obvious. The latent nature of the design defect was underscored by the testimony of two highly qualified experts in machine design who testified that it was a design defect that the bag clamps and the shroud were activated by a single button. Each of them found the fact that the shroud descended automatically after the bag clamp button was pushed to be a dangerous defect, and according to both experts, in operation the danger arising

from the descent of the shroud automatically, after the activating of the bag clamps, was not open and obvious to the operator. [(R. 1686: 12-25); (R. 1687: 1-4); (R. 1691); (R. 1477: 7-25); (R. 1478: 1-3); (R. 1518: 9-25); (R. 1519: 1-25); (R. 1520: 1-13)].

The Majority Opinion states that Gary Rubush was aware of the dangers associated with the automatically descending shroud:

> "In the present case the danger of the shroud operating under power were open and obvious. The operator of the machine was familar with and aware of the dangers in the descending shroud."

This statement is incorrect. There was a conflict in the evidence of whether or not Gary Rubush even recalled working at his employer's plant at the time of the accident. Defendants introduced his deposition, which had been taken approximately one year prior to trial, and at trial petitioner Gary Rubush explained

that the answers given therein were simply a hearsay reconstruction, not based upon actual personal knowledge of the incident or the operation of the machine. He testified at trial that he actually had no memory of working at Johns-Manville from the time he came back from service up until the time of the accident. He had no specific memory of placing the bags on the batt packers before the accident. [(R. 1832: 1-25); (R. 1833: 1-15)].

It is also important in this regard to know that any testimony given by Petitioner Gary Rubush, whether at his deposition or at trial was that of a man who had the greater portion of the temporal lobe of his brain removed, and who, according to the medical testimony, was impaired in a total brain sense. [(R. 1588: 20-25); (R. 1726: 17)]. As a consequence a fair reading of the record does not lead, as a matter of law, to a conclusion that

Gary knew and appreciated the dangers of the automatically descending shroud. It was consistently petitioners' theory that the danger of the descending shroud and the danger of the activation of the shroud and the bag clamps by one button was not open and obvious to Gary Rubush, or to anyone reasonably using that machine within its expected environment of use. That also was the evidence in the record.

At page A-8 of the Majority Opinion, the Court states:

> "In short, there existed a situation where no one testified he actually knew how the accident happened."

At page A-22, the Court states:

> "These errors are especially relevant in view of the fact that there was no explanation given as to how the accident had occurred."

Each of those statements is an incorrect statement of the record.

Garry Mackey was an eyewitness to how the accident happened. There is no necessity for speculation in view of Garry

Mackey's testimony, at [(R. 1133: 24-25); (R. 1134: 1-18); (R. 1147: 1-25); (R. 1148: 1-9); (R. 1149: 19-25); (R. 1150: 1-9)].

"Q. Did you see him get struck by the shroud?"

"A. Yes sir."

"Q. Allright, where was he when he first got struck by the shroud?"

"A. He was up there at the button leaning over kind of looked like he was struggling to get his hand free."

"Q. Did you see where his hand was in the bag clamp or under the bag clamp?"

"A. It was in the same area as the bag clamp. I know he couldn't get it loose. He was using the other hand trying to get it loose and that was when he reached up to push the button."

"Q. Which hand was in the bag clamp?"

"A. The right one."

"Q. And therefore, he was reaching with his left?"

"A. Yes sir." (R. 1149: 19-25); (R. 1150: 1-9).

Other evidence which would support the finding that petitioner had caught

his hand in the bag clamp was given by Virgil Mahoney at [(R. 1295: 6-25); (R. 1296: 14-25); (R. 1297: 1-3)].

At page A-23 of its Opinion, the Majority stated:

> "Testimony was heard from witnesses as to the feasibility of guards or the use of photoelectric cells or remote controls. Therefore there was much speculation about the cause of the accident and possible guards or warnings, none of which speculation was clearly related to the facts of this accident and how it occurred."

Such statement is unfair and untrue. It is true that testimony was heard from witnesses as to the feasibility of guards or the use of photoelectric cells or remote controls. Doctor Thomas Manos and Doctor Richard Fox testified that guards, including the use of photoelectric cells, were effective, feasible, and would have prevented this accident. Each testified that such devices would have prevented the shroud from coming down while the operator was within the arc of the shroud.

Each of these experts testified that in the normal operation of the batt packer it was necessary for the operator to have his hand near the bag clamps. Dr. Fox testified that not only was it foreseeable that an operator would inadvertently catch his hand in the bag clamps, but that sooner or later it was a "probability" that this would occur.

Dr. Manos testified that the design defect which caused the accident was that there was one button to operate both the bag clamps and the shrouds, while Dr. Fox testified that in his opinion the defect in the machine that caused the injury was the ability of the shroud to come down while personnel were in the sweep arc of the shroud. The Court, in its opinion, misstates the import of Dr. Manos' and Dr. Fox's testimony with respect to the specific reason why petitioner was within the arc of the shroud when he got hit.

Each of them points out at great length the various functions he could have been performing, or the various reasons he could have been in the area at the time the shroud descended. Each of them found that the automatic descent of the shroud, after activation of the one button, which activated the bag clamps and the shroud, was a fatal defect. Each of them found that the bagger had to put his hands in the vicinity of the bag clamps in the normal operation of the batt packer. Each of them found that regardless of the specific reason why he remained in the arc of the shroud on this particular occasion, the defects to which they testified at great length caused the accident. These experts were not presented to the jury to "reconstruct" the accident because there was eyewitness testimony, and therefore the Court's statement at page A-23 is misleading and suggests a lack of evi-

dence on the issue of causation, which is simply incorrect. The Jury was presented with testimony concerning the cause of the accident, both with an eyewitness, and expert witness type. They passed on the credibility of witnesses and made a determination. The latent nature of the design defect, particularly with reference to the automatic shroud descent, was underscored by the testimony of Drs. Thomas Manos and Richard Fox. According to these highly qualified experts in machine design, in operation, the danger arising from the descent of the shroud automatically after the activating of the bag clamps was not open and obvious to the operator. [(R. 1686: 12-25); (R. 1687: 1-4); (R. 1691); (R. 1712: 9-22)].

At page A-10 of its Opinion, the Majority stated:

> "The evidence was without conflict, both by oral testimony of witnesses and by demonstrative evidence in the

> form of drawings, diagrams and movies of the batt packer machine showing that the descent of the shroud and the operation of the batt packing procedure was open, obvious and apparent to anyone using it."

The evidence which was presented to the jury was open to the interpretation maintained by petitioners from the outset; namely, that the dangers related to the automatically descending shroud, in the course of normal machine operation were unknown and unappreciated by the reasonable worker, including the victim in this case, Gary Rubush.

The respondents' design and the expected work environment required the bagger to work in close proximity to the bag clamps; required the worker to adjust and hold onto wrinking bags while the bag clamps were activated; required the worker to direct his attention forward and downward toward the bag spout and away from the descending shroud which was above and

behind him. Given the monotonous nature of the work and their production line orientation, facts well known to the manufacturer, it was inevitable that someone would become victim to the machine's unreasonably dangerous design as a result of mere momentary inadvertence, delay or loss of orientation. This was a latent danger.

At page A-5 of the Majority Opinion, in discussing the typical operation of the bagger, and in referring to the bagger's movements, the Court states:

> "In a typical operation the bagger would place the open end of the bag over the mouth of the bag spout. This would necessitate his being within the arc of the shroud at that time. He would then push the bag clamp button which is located at chest level and be turning away from the machine. The bag clamp would set instantly to hold the bag in place."

The foregoing statement of the record is clearly erroneous when the evidence favorable to the appellees is considered.

The Majority Opinion overlooks the testimony of the witness, Donald Delay, who in considerable detail explained the operation of the batt packer and the necessity for keeping hands on the bag in the vicinity of the bag clamps until after the bag clamp button and the shroud descent button was pushed. To the extent that the above-cited observation of the Majority was intended to suggest that a worker is in the act of leaving the zone of danger at the time that the bag clamp button is pressed, this simply is not a fair characterization of the evidence. Delay's testimony is contained at [(R. 1183: 22-25); (R. 1184: 1-25); (R. 1185: 1-6); (R. 1188: 1-3); (R. 1188: 8-25); (R. 1189: 1-9; 13-25); (R. 1190: 1-9; 22-25); (R. 1191: 1-25); (R. 1192: 1-15)].

The Supreme Court of Indiana's Opinion does not set forth the instruction which the trial court gave to the jury on

the "open and obvious" issue. It is included, along with the other instructions of the Court, in the Appendix hereto and is Instruction No. 8, appearing at A-139. These are not included for this Court to consider the question of whether they are correct, but rather so that the Court will have the context within which the evidence was considered and will have a framework within which to consider the Supreme Court of Indiana's statements in its Opinion. Taking the instructions which the Court gave to the Jury as a whole, a fair interpretation is that the Jury was instructed that in order to find for the petitioners, it would have to resolve the following issues in their favor:

1. Whether the batt packer was defective and unreasonably dangerous;

2. Whether it was dangerous to an extent beyond that which would be contemplated by an ordinary consumer who pur-

chased the batt packer, or for those whose use it was intended;

3. Whether the defective condition was open and obvious;

4. Whether the risk of the defective condition was readily discernible by a reasonably prudent person in similar circumstances;

5. Whether the use to which Gary Rubush was putting the batt packer was different from, or more strenuous than that contemplated to be safe by ordinary users or consumers of a product; and

6. Whether the defective and unreasonably dangerous condition of the batt packer proximately resulted in injury and damages to Gary Rubush.

Those issues were presented to the Jury for its determination. Any fair interpretation of this Jury's verdict, in view of the instructions which it was given, and the issues that were joined

for it to determine would have to concede that the jury necessarily found that the batt packer was defective and unreasonably dangerous and that the risk of the defective and unreasonably dangerous condition of the batt packer was not readily discernible by a reasonably prudent person in similar circumstances and therefore it was not open and obvious or dangerous to an extent beyond that which would be contemplated by an ordinary consumer who purchased the batt packer or for those whose use it was intended. Those issues have been decided by the Jury. Under any instructions, whether those given by the Court or those tendered by respondents, it would be necessary for the Jury to make its finding with respect to the open and obvious nature of the alleged defect. Certainly, under the state of this record, it would never be a question of law to be removed from the Jury as to whether or

not the batt packer was defective and unreasonably dangerous or dangerous to an extent beyond that which would be contemplated by an ordinary consumer who purchased the batt packer or for those whose use it was intended. If there were a failure to properly instruct the Jury then the only remedy that the Supreme Court of Indiana had was to order a new trial with instructions to the trial court to give proper instructions. In this case all of the issues that would be decided by a Jury under any instruction have been decided, which magnifies the constitutional deprivation inflicted on these petitioners.

In addition to the denial of due process, these petitioners have also been denied equal protection of the laws. They have been deprived of the opportunity to litigate their vested cause of action because petitioner Gary Rubush was injured on an unguarded machine rather than on a

guarded machine. Under the reasoning and rationale of the Majority Opinion of the Supreme Court of Indiana, one who was injured on a guarded machine would not be deprived of his right to a Jury trial. One who is injured on an unguarded machine will be deprived of his jury trial as a matter of law in that the physical characteristics (although not necessarily the dangers) of the product upon which he is injured are not concealed. This is indeed a strange and inhumane concept when applied to the work place, where the worker has little if any choice concerning the machinery upon which he works and absolutely no input with respect to its design or manufacture. The worker who receives his injury on a machine designed by a manufacturer who makes some attempt to make the machine reasonably safe for its intended use by placing guards upon the machine may pursue his action against such

designer-manufacturer with a jury. The employee who is unfortunate enough to be injured on a machine designed and manufactured by one who makes no attempt to guard the machine in such manner as to make it reasonably safe for its intended use is deprived of his right to pursue the matter with the jury. Such a result is on its face unconscionable and clearly denies petitioners equal protection of the laws.

Carried to its logical conclusion, the Majority Opinion holds that petitioners are absolutely barred from recovery because the product upon which Gary Rubush was injured was so defective and so dangerous that it became as a matter of law not "unreasonably" dangerous. To articulate the principle is to bely its viability as a sound principle of law and justice and to underscore that the action of the Supreme Court of Indiana in re-

versing the judgment, as a matter of law, is a denial of equal protection of the laws as well as of due process of law.

CONCLUSION

Wherefore, Petitioners respectfully submit that a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Court of Indiana.

Respectfully submitted,

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Appendix

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81-2072
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GERALD G. RUBUSH and PHYLLIS C. RUBUSH,

Petitioners,

vs.

BEMIS COMPANY, INC., and WABASH PRODUCTS, DIVISION OF BEMIS COMPANY, INC.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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IN THE

SUPREME COURT OF INDIANA

BEMIS COMPANY, INC., and WABASH PRODUCTS, DIVISION OF BEMIS CO., INC., Appellants, v. GERALD G. RUBUSH and PHYLLIS C. RUBUSH, Appellees.	)	Filed November 12, 1981 with Marjorie H. O'Laughlin, Clerk of the Supreme and Court of Appeals No. 1181 S 319

APPEAL FROM THE HANCOCK COUNTY CIRCUIT COURT
The Honorable Wesley W. Ratliff, Jr.
Special Judge
ON PETITION TO TRANSFER

PIVARNIK, J.

This cause comes to us on a Petition to Transfer from the First District Court of Appeals, brought by Defendants-Appellants, Bemis Company, Inc., and Wabash Products, Division of Bemis Company, Inc. A judgment of seven hundred seventy-five thousand dollars ($775,000) was

entered against petitioner. Seven hundred fifty thousand dollars ($750,000) in damages was awarded to Gerald Rubush and twenty-five thousand dollars ($25,000) was awarded to Phyllis Rubush. Petitioner appealed from this judgment and the Court of Appeals affirmed the judgment in favor of Gerald G. Rubush and reversed the judgment in favor of Phyllis C. Rubush and remanded her cause of action for loss of consortium for a new trial on damages only. Bemis Co., Inc. v. Rubush, (1980) 401 N.E.2d 48. Petitioner now seeks transfer of this cause.

The cause was tried in the trial court on the theory of strict liability in tort under §402 A of the Restatement (Second) of Torts (1965). The Court of Appeals affirmed the trial court in its application of §402 A which permitted Bemis to be found liable in strict liability even though the danger was open

and obvious. We find the Court of Appeals and the trial court to be in error in their interpretation of strict liability in tort under §402 A and accordingly grant transfer and vacate the opinion of the Court of Appeals.

Gerald G. Rubush was employed as a bagger on a fiber glass insulation batt packing machine for Johns-Manville Corporation. The evidence was that Rubush was an experienced bagger although he had been working on the particular job for only about ten minutes when he was injured on October 19, 1971. The batt packing machine was designed by Bemis Company, Inc., and Wabash Products Co., Division of Bemis Co., Inc., (both hereinafter referred to as Bemis). While working as a bagger on the batt packer and during the course of the batt packer's operation, Rubush was struck in the head by a moving part of the machine. This moving part

was called a shroud and it was a visible, moving part of the batt packing machine. Rubush sustained serious injuries to his skull and brain.

The function of the batt packer is to pack batts of insulation into heavy paper bags. This is accomplished in two phases. The first phase is a compression phase in which batts are vertically compressed into the compression chamber of the packer to the approximate size of the open end of the bag. The batts are then moved horizontally out of the compression chamber. The second phase is the bagging phase during which the bag is filled with compressed batts which have been horizontally pushed from the compression chamber to the shroud assembly area through a square opening in the base of the wall of the compression chamber, called a bag spout. The bagger places the open end of a bag around the mouth

of the bag spout, the top of which is about 23 inches from the ground, and the bag is secured to the mouth of the metal bag spout by a bag clamp. The bag clamp is activated by a push button which is located at chest or shoulder height and is one of three buttons on a panel. The bag clamp button is pushed by the bagger after he places the bag over the mouth of the bag spout. Activation of the bag clamp also activates a seven-foot long metal shroud which is located directly in front of the bag spout. The shroud is hinged on its bottom end on the frame of the batt packer at the level of the top of the bag spout. When the bagger pushes the bag clamp button the bag is clamped and the shroud descends under power in an arc to a horizontal position above the bag. The end of the shroud slightly overlaps the bag spout. The function of the shroud is to furnish support to the paper

bag as it is being filled with batts, to prevent the bag from being torn. The batt packer had two sets of push button controls, each set consisting of the activating bag clamp button, a bag release button and an emergency stop button. A set of controls was situated on each side of the machine.

In a typical operation the bagger would place the open end of the bag over the mouth of the bag spout. This would necessitate his being within the arc of the shroud at that time. He would then push the bag clamp button which is located at chest level and be turning away from the machine. The bag clamp would set instantly to hold the bag in place. The shroud, being activated at the same time, would commence its descent to a horizontal position, which descent would take four or five seconds. The shroud would descend at a rate of one to

one and one-half feet per second and would have the basic pushing force which would come from an air cylinder rather than that which would come from a sudden impact. There was evidence that the timing of the descent of the shroud could be adjusted and that it was adjusted in the Johns-Manville plant after some study and investigation at a rate that would allow the slowest worker to move back after the bag clamp was secured and before the shroud came down to the spout.

There was evidence that Rubush may have caught his hand under the bag clamp and was unable to extricate himself to avoid the descending shroud. There was testimony that it was sometimes necessary to hold the bag on the bag spout with the hand until the bag clamp set, but not where a hand would be clamped. One witness testified that when injured, Rubush appeared to have his hand caught, then

fell away from the machine. There was evidence that one could place a hand under the clamp if the fingers were extended, but that it was not necessary to do so and that it would be unreasonable and unlikely that anyone would do so. It would be difficult for one to get his hands in such a position that the bag clamp would clamp down on the hands, and there would be no need for a bagger to have his hands in that area at any time during the operation. If one's hands were under the clamp when it set, they would have been subjected to 1400 pounds of pressure. It would have been nearly impossible to have removed them without releasing the clamp. Releasing the clamp would cause the shroud to retract and prevent descent. Medical witnesses testified that there was no demonstration of trauma on Rubush's hand which might be expected if it had been clamped. Rubush

was operating two machines simultaneously by loading one and then turning to load the other one. The typical operation was for one bagger to load one machine. In short, there existed a situation where no one testified he actually knew how the accident happened. Rubush was unable to recall the occurrence, and attempts to explain or reconstruct the incident were fraught with inconsistencies.

There was no evidence that the machine had malfunctioned or that there was a defect in its operation. Similar batt packers had been used during a 10-year period from 1961-1971 without any reports of workers having gotten hands caught in bag clamps. In 1969, BP 18 and BP 19 were purchased and had been used before and after Rubush's injury without any other injuries having been reported. No modifications were made after the accident

and the machine was tested for malfunctions by examination of mechanics, pipe fitters and electricians, and reviewed by an accident review committee. It was determined that there was nothing wrong with the machine involved, either mechanically or electrically. The same batt packer was used after the accident without changes, additions, guarding apparatus or alterations.

Appellees admit that the descent of the shroud was an open and obvious danger which was well known to the operators of the machines and which would be obvious to anyone observing the machine. They contend that the danger in the machine was the fact that the machine could operate so that the shroud could descend with any object, or anyone within the path of the shroud which they have designated as a "zone of danger". Their claim is that the machine should have been made so that

it was impossible for the shroud to descend, or that there should have been some kind of automatic device which would have prevented its descent if anything were in its path. They claim the failure to so design the machine is a defect.

Bemis' main contention is that it cannot be held liable in strict liability under §402 A since any dangers in the descending shroud were open and obvious rather than latent or hidden defects that required a warning to the user. The evidence was without conflict both by oral testimony of witnesses and by demonstrative evidence in the form of drawings, diagrams, and movies of the batt packer machine showing that the descent of the shroud in the operation of the batt packing procedure was open, obvious, and apparent to anyone using it. The descent was caused when the batt packer pushed the button. The evidence was that per-

sonnel of Johns-Mansville trained batt packers and taught them proper use of the machine and all were aware of the operation of the machine and the dangers of the descending shroud. They presented evidence that types of guards such as photo electric cells, sweeps or other devices were considered and rejected as not being effective, necessary, or economically feasible. Similar evidence was heard with regard to the placement of more remote control buttons with arguments made that they would make the machine more dangerous and open to being activated by persons other than the bagger himself.

The basic premise for the imposition of strict liability is stated in §402 A as follows:

> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the

> ultimate user or consumer, or to his property, ..."

Comment g to §402 A adds the following:

> "The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him . . . ."

Comment i discusses and defines "unreasonably dangerous" as follows:

> "The rule stated in this Section applies only where the defective condition of the produce makes it unreasonably dangerous to the user or consumer . . . ."

Hence, to be actionable under §402 A, the injury-producing product must be unreasonably dangerous, that is, dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. The harm is not actionable unless the product is "unreasonably

dangerous."

As noted above, Bemis' principle argument is that the functions of the machine were apparent, and any dangers were open and obvious to any person using it. The open and obvious rule finds support in Indiana cases and cases decided in federal courts applying Indiana law in diversity. The rule may be stated generally as follows: In the area of products liability, based upon negligence or based upon strict liability under §402 A of the Restatement (Second) of Torts, to impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product. Although the manufacturer who has actual or constructive knowledge of an unobservable defect or danger is subject to liability for failure to warn of the danger, he has no duty to warn if the

danger is open and obvious to all. See Burton v. L. O. Smith Foundry Products Co., 529 F. 2d 108 (7th Cir. 1976); Posey v. Clark Equipment Company, 237 F. 2d 560 (7th Cir. 1969); Greeno v. Clark Equipment Co., 237 F. Supp. 427 (N.D. Ind. 1965); and J. I. Case Company v. Sandefur, (1964) 245 Ind. 213, 197 N. E. 2d 519.

J. I. Case Co. v. Sandefur, supra, included the following discussion:

> "As stated by the leading authorities, public policy has compelled this gradual change in the common law because of the industrial age where there is no longer the usual privity of contract between the user and the maker of a manufactured machine. On the other hand, there must be reasonable freedom and protection for the manufacturer. He is not an insurer against accident and is not obligated to produce only accident-proof machines. The emphasis is on the duty to avoid hidden defects or concealed dangers."

245 Ind. at 222, 197 N. E. 2d at 523.

The Court, in Sandefur, supra, discussed its reasoning further as follows:

> "A manufacturer may determine the character of the materials to be used primarily for the purpose of producing or manufacturing an 'economy model' as compared with a luxury model - the life of one being much less than the life of the other. Yet there are reasonable limits on such 'economy', for example: a machine may not be built with extremely weak or flimsy parts concealed by an exterior such as to mislead a user into believing it safe and stable when, in fact, it is not, thus causing a user to rely thereon, to his injury. This again is a question of fact, namely, was there a concealed defect or hidden danger to the user?"

345 Ind. 222-23, 197 N. E. 2d at 523.

In Greeno, supra, Judge Eschbach stated:

> "A defective condition is a condition not contemplated by the consumer-user and which is unreasonably dangerous to him or his property, that is, more dangerous than would be contemplated by the ordinary consumer-user with the ordinary knowledge of the community as to its characteristics and uses. Re-

> statement, supra, Comment at 351-52. An axe is not unreasonably dangerous because, as in negligence law, users would contemplate the obvious dangers involved. But a farm combine with a weak lid over the auger would constitute an unreasonable danger because such danger is beyond the contemplation of ordinary users."

237 F. Supp. at 429.

Several allegations of error were raised relating to this general rule. They involved the conduct of voir dire, instructions given and refused and the court's comments before the jury. They also relate to the allegation that the verdict is not sustained by the evidence. The Court of Appeals found no error in these issues. We disagree.

During voir dire counsel for Bemis sought to question the potential jurors on the open and obvious rule but was prevented from doing so by the trial judge. Bemis tendered final instructions 4 and 5 which stated that a manufacturer

is not obligated to design an accident-proof machine, but a reasonably safe one which does not contain hidden or concealed defects, and, in brief, stated the open and obvious rule. The trial court refused to give Bemis' instructions 4 and 5 and also refused their tendered instruction No. 3, which provided:

> "The plaintiffs, in order to prevail here, must establish by a preponderance of the evidence each of the following:
>
> First, that at the time the Batt Packer in question was supplied by the defendant it was in a defective and unreasonably dangerous condition not contemplated by the ultimate consumer such that it was dangerous to an extent beyond that which would have been contemplated by the ordinary consumer who purchased or used it with like age, judgment, experience, and knowledge as that which was possessed by the plaintiff at the time of his injury.
>
> Second, that the Batt Packer was expected to and did reach the ultimate consumer without substantial change in its condition;

> Third, that plaintiff's injuries were a direct and proximate result of said defective and unreasonably dangerous condition.
>
> If you find that the plaintiffs have established each of these elements, your verdict should be for the plaintiffs, unless you find for the defendant on its affirmative defenses. On the other hand, if you do not find that plaintiffs proved each of these elements by a preponderance of the evidence, then you should find for the defendant, without regard to whether defendant has proved its affirmative defenses."

*****

The trial court failed to define unreasonably dangerous under the strict liability theory as was set out in defendant's tendered instruction 3. This failure to instruct was also compounded when the jury was allowed to hear, over the objection of Bemis, the testimony of Dr. Richard L. Fox, a professor of engineering at Case Western Reserve University, who was called as an expert

witness in the field of machine design and qualified as such. He defined "unreasonable hazard" as follows:

> "[A] hazard or risk in a product is unreasonable if it could be removed and the cost of removal is not significant nor the cost of removal does not seriously reduce the utility of the product. This is a basic definition. In other words basically in simple words it says if you can get rid of the hazard at little cost you have no business leaving it in, so it is unreasonable to leave it in, and this is, this is the term that we use."

He testified further as to ways in which the machine could have been made safer. Dr. Manos, another expert witness, testified similarly. The jury could have relied on this definition then, and determined that even though the dangerous characteristic of the descending shroud was open and obvious to Rubush as he operated the machine, and known to him, they could find Bemis liable for not conforming to the standards set by

Dr. Fox and Dr. Manos. This would make manufacturers insurors of any product they put in the open market and render them liable for injuries and damages to those using the machine regardless of the facts and circumstances surrounding the injury. This is not the law in Indiana.

In Posey v. Clark Equipment Co., supra, plaintiff was operating a fork lift truck manufactured by Clark Equipment Co., when a carton from a high stack became dislodged and fell on him, causing serious injuries. The fork lift truck was capable of lifting an article to 106 inches, but did not have an overhead guard to protect the operator from falling objects. Plaintiff's employer wanted the fork lift to be designed as low as possible so that it could enter areas such as street trucks with low head room. An overhead guard was available and could have been mounted on the truck in the

space of ten minutes, but this would have made the lift stand too high to be driven into the back of a truck. While using the equipment in this condition, Posey was taking cartons from a lower stack when the movement caused a higher stack to sway and cause a carton at the top of the higher stack to fall on him. Judge Dillon, of the Southern District Court, directed a verdict in favor of the defendant, and appeal was taken to the Seventh Circuit Court of Appeals. In affirming the District Court, the Seventh Circuit Court of Appeals observed:

> "Posey's theory appears to be that if there had been a warning notice on the truck, the employer might have purchased a guard and instructed his employees to install it whenever the truck was used among high stacks, and Posey, as well as other employees, would have been alerted to the importance of using the guard.
>
> In directing a verdict, Judge Dillon concluded that the danger

> of an object falling upon an unprotected operator was so obvious that the user of the truck would reasonably be expected to know about it."

409 F. 2d at 563.

The Court then further observed that a warning may be necessary to prevent the product from being unreasonably dangerous, but a seller is not required to warn when the danger, or potentiality of danger is generally known and recognized. The court then found that the District Judge had properly directed the verdict in favor of the defendant since any ordinary user or operator of fork lifts would recognize the danger facing Posey as he drove the fork lift truck in the area of high stacks while unprotected and that it was not a situation where only persons of special experience would realize the danger which might befall an unprotected operator. Therefore there was no evidence to support a finding

that Clark had a duty, under the circumstances, to supply a warning notice.

In the present case, the danger of the shroud operating under power were open and obvious. The operator of the machine was familiar with and aware of the dangers in the descending shroud. The court erred in refusing to instruct the jury on the open and obvious rule and in failing to define "unreasonably dangerous".

Other issues which were raised in this cause relate to the plaintiff's conduct and the instructions which were given on negligence and incurred risk. Instruction 14 stated that in order to find for Bemis the jury had to find that the batt packer was not defective or unreasonably dangerous, and that Gary was contributorily negligent in causing his injury. Bemis argues that this misstated the law because if Gary's injuries were proxi-

mately caused by his own conduct, he could still recover against Bemis. We find this argument persuasive. It is expecially significant since this instruction was argued to the jury by counsel and Rubushs' counsel read part of that instruction to the jury and interpreted it.

These errors are especially relevant in view of the fact that there was no explanation given as to how the accident had occurred. One witness testified that he thought Mr. Rubush caught his hand. One of plaintiff's expert witnesses, Dr. Manos, testified that he was totally unable to scientifically determine how the accident occurred. Dr. Fox, another plaintiff's expert, admitted he did not have any facts as to how the accident happened and that it was irrelevant to him how the accident occurred. Testimony was heard from witnesses as to the feasibility of guards, or the use of

photo electric cells or remote controls. Therefore, there was much speculation about the cause of the accident and about possible guards or warnings, none of which speculation was clearly related to the facts of this accident and how it occurred.

Additional errors occurred when the jury was incorrectly instructed that if it found that the dissolution of the Rubush marriage was a proximate result of Gary Rubush's injuries, they could consider the value of Phyllis Rubush's loss of consortium after the date of the dissolution as an element of damage. In view of our disposition of this case, further discussion of these errors is not necessary.

For the above reasons, transfer is granted, the Court of Appeals opinion is vacated and this cause is remanded to the trial court with directions to enter

judgment for defendants-appellants Bemis Company, Inc., and Wabash Products, Division of Bemis Company, Inc.

Givan, C. J., and Prentice, J., concur.

Hunter, J., dissents with separate opinion in which DeBruler, J., concurs.

DeBruler, J., dissents with separate opinion in which Hunter, J., concurs.

IN THE

SUPREME COURT OF INDIANA

BEMIS COMPANY, INC., and WABASH PRODUCTS, DIVISION OF BEMIS CO., INC.,	)	Filed November 12, 1981 with Marjorie H. O'Laughlin, Clerk of the Supreme and Court of Appeals
Appellants	)	
v.	)	
GERALD G. RUBUSH and PHYLLIS C. RUBUSH,	)	No. 1181 S 319
Appellees.	)	

ON PETITION TO TRANSFER

DeBRULER, J. - Dissenting

The Court of Appeals concluded that the trial judge correctly instructed the jury on the strict liability claim. I agree. The Products Liability Act was not in existence at the time of the trial below. J. I. Case Co. v. Sandefur, (1963) 245 Ind. 213, 197 N. E. 2d 519, had held that privity of contract between the manufacturer and injured user

was no longer a necessary element in a suit by the latter against the former for negligent manufacture of a product with hidden defects. Ayr-Way Stores, Inc. v. Chitwood, (1973) 261 Ind. 86, 300 N. E. 2d 335, following its predecessor cases in the Courts of Appeal, had held that the negligence of a manufacturer need not be proven in a suit against it by one injured through use of its product, and also changed the formulation of the basic duty of the manufacturer towards users of its product. J. I. Case Co. v. Sandefur, supra, regarded the legal duty of the manufacturer to be to avoid hidden defects and concealed dangers in its products. Ayr-Way Stores, Inc. v. Chitwood, supra, requires the manufacturer to avoid defective conditions unreasonably dangerous to users. The

question of the manner in which courts should deal with evidence that the defective condition of a product would be open and obvious to the average user in the aftermath of Ayr-Way Stores, Inc., was not addressed by this Court. The trial judge below responded in substance by instructing the jury that it was authorized to consider evidence of the fact that any defective condition was open, apparent, and obvious to the user, in determining whether the machine was defective and unreasonably dangerous in having no guard system or in providing no adequate warnings, but that a finding of the open and obvious defect would not in and of itself necessarily preclude recovery. Thus, in the trial court's mind, and I think correctly so, "hidden defects and concealed dangers" was subsumed within the new standard, "defective condition unreasonably dangerous", and the new

focus was no longer upon whether the defects and dangers of the product were hidden and concealed, but upon whether they were unreasonable. Hidden and concealed defects and dangers may be unreasonable, and again they may not be. Open and obvious dangers may be reasonable, and again they may not be. Dangers in machines like the batt packer can, where the machine is started and stopped many times within the space of an hour in an assembly-line, mind-dulling fashion, under the standard applicable here, be both open and obvious and unreasonable, since knowledge of them would not arm the user to avoid injury.

The operator of this machine activated two phases by a single manual button. A button was also provided at the same location to shut the machine off. Upon activation, the clamps closed,

thereby securing the paper bag to the spout and simultaneously the shroud descended. During normal operation it was sometimes necessary to hold the paper bag with the hand until the bag clamp set. Bemis concedes this hands-on necessity. Obviously, given this necessity, it was often necessary for the operator to hold the bag on the spout with one hand and activate the clamp with the other, while still in a position to be struck by the descending shroud. There was no safety device which would automatically stop the descent of the shroud in the event that the operator was caught in the machine and the shroud met resistance. One could only shut the machine down manually in such emergency circumstances.

A reasonable trier of fact could look to this evidence and reasonable inferences therefrom, and reasonably conclude that it is more probable than not that

this machine as manufactured was in a defective condition unreasonably dangerous to the user. Any power-driven machine which is designed so as to require the operator to keep a part of the body in a position to be cut, mashed, or struck, until the power is engaged and its operation commenced, presents a case for the jury, on this element of the strict liability claim. In operation, this bagging machine required the operator to keep his hand and arm at the spout, under the arc traveled by the shroud, when activating the machine.

In order to prove a strict liability claim, the plaintiff must also present evidence that he has been injured by the product. Cornette v. Searjeant Metal Products, Inc., (1970) 147 Ind. App. 46, 258 N. E. 2d 652. The above-mentioned evidence and reasonable inferences there-

from is sufficient to warrant the trier of fact in concluding that it is more probable than not that plaintiff was injured by the product. He was required on occasion to use his hands to hold the bag on the spout so that it would be caught under the clamp. His hand was in fact caught under the clamp during operation, and he was held close to the machine and crushed by the descending shroud on it. The sufficiency of evidence on other elements of the claim is not in issue. I believe, therefore, that the trial court correctly put this case to the jury, and must therefore dissent to the result reached by this Court.

Hunter, J., concurs.

IN THE

SUPREME COURT OF INDIANA

BEMIS COMPANY, INC., and Wabash Products, Division of Bemis Company, Inc., Appellants (Defendants below), v. GERALD G. RUBUSH and PHYLLIS C. RUBUSH, Appellees (Plaintiffs below).	Filed November 12, 1981 with Marjorie H. O'Laughlin, Clerk of the Supreme and Court of Appeals Supreme Court No. 1181 S 319 Court of Appeals No. 1-877 A 164

ON PETITION TO TRANSFER
APPEAL FROM THE HANCOCK CIRCUIT COURT
THE HONORABLE WESLEY W. RATLIFF, JR.,
SPECIAL JUDGE

HUNTER, J. -- Dissenting.

I must respectfully dissent from the majority opinion. While references to erroneous instructions, improperly admitted evidence, and conflicting testimony occur throughout the opinion, the

remedy granted by the majority reveals the rule of law laid down therein. That the majority directs the trial court to "enter judgment for defendants-appellants Bemis Company, Inc., and Wabash Products, Division of Bemis Company, Inc." (emphasis added) unmistakably indicates its decision rests on a singular proposition: recovery for injuries suffered at the hands of an "open and obvious danger" are barred as a matter of law under this jurisdiction's interpretation of Section 402A of the Restatement (Second) of Torts (1965). Erroneous instructions or improperly admitted evidence would warrant only a new trial, while the standard of review incumbent upon us -- in view of the fact the jury found for plaintiff Rubush -- would require us to affirm the judgment entered against Bemis Company, Inc., and its subdivision (hereinafter collectively

referred to as "Bemis Company").

Numerous considerations not discussed by the majority surround the issue before us. Those concerns were recognized by the Court of Appeals which, based on its extensive analysis, rejected the broad and sweeping rule the majority adopts today as the law of this jurisdiction. For the unanimous Court of Appeals, Judge Neal defined the more moderate stance prevalent among jurisdictions which have considered the question before us:

> "The proper role of the open and obvious rule is that it is but one of the factors which must be considered in determining whether a product is in a defective condition unreasonably dangerous. This like the determination of negligence, requires judgment in a given situation. This is a question for the determination of the jury under proper instructions in any given case. Gilbert, supra. The trier must determine from the evidence, including a consideration of evidence of any open and obvious dangerous

> characteristics of a product, along with other factors, the ultimate question of whether the product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer, with the ordinary knowledge common to the community." Bemis Co., Inc. v. Rubush, (1980) ___ Ind. App.____, 401 N.E. 2d 48, 57; [emphasis added].

Similarly, the extensive analysis of the precise question before us in Note, Indiana's Obvious Danger Rule for Products Liability, 12 Ind. L. Rev. 397 (1979) culminates in the conclusion that the position adopted by the majority is a "harsh and anachronistic rule" which defies the considerations underlying the law of products liability. Id. at 398. In virtually prescient fashion, the commentator has contemplated and decried the possibility that dictum contained in our federal diversity case law would lead us to the position the majority adopts today. Id.

Other jurisdictions, however, have rejected outright the notion that under the law of products liability, recovery for injuries sustained at the hands of an "open and obvious" or "patent" danger should be barred as a matter of law. See, e.g., Byrns v. Riddell, Inc. (1976) 113 Ariz. 264, 267, 550 P. 2d 1065, 1068 ("We do not subscribe to this 'patent-latent' distinction . . . ."); Pike v. Hough Co., (1970) 2 Cal. 3d 465, 474, 85 Cal. Reptr. 629, 635, 467 P. 2d 229, 235 (".... the modern approach does not preclude liability solely because a danger is obvious."); Auburn Mach. Works Co., Inc. v. Jones, (1979) ___Fla.___, 366 So. 2d 1167 ("We reject the [patent danger] doctrine .... ."); Byrnes v. Economic Machinery Company, (1972) 41 Mich. App. 192, 202, 200 N.W. 2d 104, 109 (" .... awareness alone does not preclude

negligence."); Brown v. North Am. Mfg. Co. (1978) 176 Mont. 98, 106, 576 P. 2d 711, 717 ("We reject such a rule [open and obvious danger]."); Bexiga v. Havir Mfg. Co., (1972) 60 N.J. 402, 412, 290 A. 2d 281, 286 ("It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against."); Micallef v. Miehle Co., (1976) 39 N.Y. 2d 376, 379, 348 N.E. 2d 571, 573 ("The time has come to depart from the patent danger rule ... ."); Dorsey v. Yoder Company, (E.D. Penn. 1971) 331 F. Supp. 753, 759 (applying Pennsylvania law) (" ... even though the danger of unguarded rotary blades was obvious to plaintiff, this does not ipso facto preclude recovery."); Palmer v. Massey-Ferguson, Inc., (1970) 3 Wash. App. 508, 517, 476 P. 2d 713, 719 ("The law, we think,

ought to discourage misdesign rather than encouraging it in its obvious form.").

In Micallef v. Miehle Co., supra, New York's highest Court overruled Campo v. Scofield, (1950) 301 N. Y. 468, 95 N.E. 2d 802, which has long been recognized as the landmark decision in support of the "open and obvious" or "patent" danger rule. Not insignificantly, Campo was relied upon by this Court in J.I. Case Company v. Sandefur, (1964) 245 Ind. 213, 197 N.E. 2d 519, wherein we rejected the rule that privity of contract is necessary to maintain a cause of action against the manufacturer of a product. In Sandefur, we cited Campo in the following context:

> "As stated by the leading authorities, public policy has compelled this gradual change in the common law because of the industrial age where there is no longer the usual privity of contract between the user and the maker of a manufactured

> machine. On the other hand, there must be reasonable freedom and protection for the manufacturer. He is not an insurer against accident and is not obligated to produce only accident-proof machines. The emphasis is on the duty to avoid hidden defects or concealed dangers. Campo v. Scofield (1950) 301 N.Y. 468, 95 N.E. 2d 802." Id., 245 Ind. at 222, 197 N. E. 2d at 523.

It is this citation to Campo, together with the emphasis in Sandefur on the concealed danger at issue there, that prompted the dictum in our federal diversity cases from which the majority extracts its extreme position. See, e.g., Posey v. Clark Equipment Co., (7th Cir. 1969) 409 F. 2d 560 (citing Sandefur for the proposition that "the defect must be hidden"); Schemel v. General Motors Corp., (7th Cir. 1967) 384 F. 2d 802 (relying on Sandefur and Campo for the proposition that a manufacturer's duty is to avoid "latent or concealed dangers"); Evans v. General Motors, (7th Cir. 1966)

359 F. 2d 822, 824-5 (quoting Campo for the proposition that a manufacturer need not "render" a product "more safe where the danger is obvious"). The origin, development, and limitations of our federal case law are fully analyzed in Note, Indiana's Obvious Danger Rule for Products Liability, supra, and for purposes of brevity, need not be discussed in the context of this dissenting opinion. It is conceded the language of these decisions provides support for the "open and obvious" bar, as the majority has stated; it is also acknowledged the federal diversity authority is not binding on us insofar as the point of law at issue is concerned. Chaffin v. Nicosia, (1974) 261 Ind. 698, 310 N.E. 2d 867.

So it is appropriate and prudent that we assess the validity of the "open and obvious danger" rule in the light of the

rationale upon which other jurisdictions have rejected it. Those analyses rest on a common premise: prohibiting recovery as a matter of law for injuries sustained at the hands of an open and obvious danger defeats the most fundamental considerations which prompted recognition and implementation of Section 402A in our courts of law.

Section 402A embodies the concept of "strict liability" in tort: First embraced in this jurisdiction in Cornette v. Searjeant Metal Products, Inc., (1970) 147 Ind. App. 46, 258 N.E.2d 652; Perfection Paint & Color Co. v. Konduris, (1970) 147 Ind. App. 106, 258 N.E. 2d 681; and Ayr-Way Stores, Inc. v. Chitwood, (1973) 261 Ind. 86, 300 N.E. 2d 335, the concept rests on twin propositions: (1) the manufacturer of a product sold on the open market undertakes and assumes

a responsibility to the public to produce a reasonably safe product; and (2) the public justifiably relies on the expertise of the manufacturer in its expectation that the product is designed to afford reasonable safety in its foreseeable and intended uses. Restatement (Second) of Torts, § 402A, Comment c. These bedrock considerations are supplemented with the policy that primary responsibility for product safety must lie with the manufacturer who, in addition to his expertise, is in the position to distribute the engineering and production costs of making products safe for their reasonably foreseeable and intended uses. Id.

It is these considerations which have prompted our courts to remove products liability from the realm of general negligence principles into the arena of

strict -- but not absolute -- liability. It has never been nor should it ever become the rule that a manufacturer is liable for each and every injury suffered in connection with a product; that would clearly be illogical, for the manner in which a product is used must inevitably bear on the question of fault for any injury.

But while absolute liability is not imposed on manufacturers, their responsibilities are elevated beyond the scope of negligence principles. The concept of strict liability in tort places special emphasis on "fault" liability without "connotation of moral blame," as Dean Prosser has explained:

> "There is a broader sense in which 'fault' means nothing more than a departure from a standard of conduct required of a man by society for the protection of his neighbors; and if the departure is an innocent one, and the defendant cannot help

> it, it is none the less a departure, and a social wrong. The distinction still remains between the man who has deviated from the standard, and the man who has not. The defendant may not be to blame for being out of line with what society requires of him, but he is none the less out of line.
>
> "In this broader sense there is 'fault' in much innocent conduct. Tort liability never has been inconsistent with the ignorance which is bliss, or the good intentions with which hell is said to be paved. A trespasser is not excused by the honest, reasonable belief that the land is his own; ... . There are many situations in which a careful person is held liable for an entirely reasonable mistake. In all this there is nothing new. Socially, and legally, these defendants are at fault; whether they are individually so, in spite of the fact that they are blameless, appears to be entirely a matter of definition, rather than substance, and the argument leads only to a pointless dispute over the meaning of a word." Prosser, Law of Torts, ch. 13, p. 493-4 (4th Ed. 1971) [footnotes omitted].

What is demanded of manufacturers by the strictures of Section 402A is that products must not be "unreasonably dangerous"

as employed in their reasonably foreseeable or intended use. Restatement (Second) of Torts, § 402A(1).

Whether a manufacturer has satisfied the standard is dependent on the facts of each case; the duty may be violated in various ways, as the Court of Appeals summarized in the instant case:

> "In addition to the open and obvious rule, various other rules and concepts have been developed by the courts in the application of § 402A. At least three types of unreasonably dangerous defects may exist under § 402A. A product may be defective because of (1) manufacturing flaws, (2) defective designs, and (3) failure to supply complete information about the product's dangers. Burton, supra. Restatement (Second) of Torts §402A, Comments j and k. A product, although virtually faultless in design, material and workmanship, may be considered defective so as to impose strict liability where the manufacturer fails to discharge a duty to warn or instruct with respect to potential dangers in the use of the product. Nissen Trampoline Company, supra. A product may

> fail to meet reasonable safety expectations by failing to cope with foreseeable mishaps, by lacking feasible safety devices. Gilbert v. Stone City Construction Company, Inc., (1976) Ind. App., 357 N.E. 2d 738. Misuse of a product and incurred risk are defenses. Dias v. Daisy-Heddon, (1979) Ind. App., 390 N.E. 2d 222. Unavoidably dangerous, but useful and desirable, products exist and are marketed, but liability does not attach if adequate warning and instructions are given. Restatement (Second) of Torts § 402A, Comment k." Bemis Co., Inc. v. Rubush, supra, at 56.

Here, as the majority has acknowledged, the allegation faced by Bemis Company is that their product, the batt-packer, was defective in its design. The response of Bemis Company, which is adopted by the majority, is that a product designed so that its danger is "open and obvious" is necessarily not "unreasonably dangerous."

It is a proposition replete with irony. Whereas Section 402A has universally been interpreted to require manufacturers to avoid latent dangers, they

are nonetheless told all they need do to escape liability is to make those dangers patent. It is to say that a manufacturer should refrain from installing protective guards on a product, for those guards might only serve to make the danger less "open and obvious." The rule ignores the focus of Section 402A -- whether the manufacturer, without impairing the functional capacities of the product and with reasonable additional costs -- could have rendered the product reasonably safe. The rule, in short, as many jurisdictions have expressly recognized, encourages misdesign in its obvious form. Palmer v. Massey-Ferguson, Inc., supra; Brown v. North Am. Mfg. Co., supra; Dorsey v. Yoder Company, supra; Auburn Mach. Works Co., Inc. v. Jones, supra; Micallef v. Miehle Co., supra; Pike v. Hough Co., supra.

Courts and commentators have ela-

borated on the considerations surrounding products liability which weigh against a flat bar to recovery for injuries suffered at the hands of an open and obvious danger. It has been recognized that notwithstanding the patent nature of a danger, the user of a product may not recognize every risk which his actions entail, nor fully appreciate the gravity of the harm which may follow. Similarly, it has been acknowledged that the gravity of harm which may follow must be assessed with recognition that momentary lapses, whether mental or physical, are part and parcel of the human experience; that is noteworthy in circumstances such as those present here, where Rubush's assembly-line duties included double duty on two batt-packing machines, each operating on a four to five second time frame. Concomitantly, it has been recognized that employee-users of a product cannot

purely be characterized as voluntarily assuming each and every risk they encounter on the job, for their only option to exposing themselves to an obvious danger may be to foresake the employment. That dubious prospect is exacerbated by the continued and unyielding application of the employment at will doctrine in this jurisdiction. See, e.g., Campbell v. Eli Lilly & Co., (1980) ___ Ind. App. ___, 413 N.E. 2d 1054 (Ratliff, J., dissenting in part), trans. denied (1981) ___Ind.___, 421 N.E. 2d 1099 (Hunter, J., dissenting); Martin v. Platt, (1979) ___Ind. App. ___, 386 N.E. 2d 1026.

For these various reasons, the jurisdictions cited herein have recognized that manufacturers must bear responsibility to insure that the technology of complicated machinery be not "unreasonably dangerous." To make the danger "open and obvious" does not per se

satisfy the responsibility, as explained in 2 Harper & James, The Law of Torts § 28.5 p. 1543 (1956):

> "[T]he bottom does not logically drop out of a negligence case against the maker when it is shown that the purchaser knew of the dangerous condition. Thus if the product is a carrot-topping machine with exposed moving parts, or an electric clothes wringer dangerous to the limbs of the operator, and if it would be feasible for the maker of the product to install a guard or a safety release, it should be a question for the jury whether reasonable care demanded such a precaution, though its absence is obvious. Surely reasonable men might find here a great danger, even to one who knew the condition; and since it was so readily avoidable they might find the maker negligent. Under this analysis the obviousness of a condition will still preclude liability if the obviousness justifies the conclusion that the condition is not unreasonably dangerous; otherwise it would simply be a factor to consider on the issue of negligence." (Footnotes omitted.)

As indicated by Harper and James in their concluding sentence, and as the jurisdictions cited herein have held, the

openness and obviousness of the danger should be but one factor in the question whether a product was designed in an unreasonably dangerous manner. As explained in Micallef v. Miehle Co., supra, the ultimate question of whether a manufacturer has exercised due care must be resolved on a case-by-case basis:

> "What constitutes 'reasonable care' will, of course, vary with the surrounding circumstances and will involve 'a balancing of the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution which would be effective to avoid the harm.' (2 Harper & James, Torts, § 28.4; see Pike v. Hough Co., 2 Cal. 3d 465, 85 Cal. Rptr. 629, 467 P. 2d 229, supra.) Under this approach 'the plaintiff endeavors to show the jury such facts as that competitors used the safety device which was missing here, or that a 'cotter pin costing a penny' could have prevented the accident. The defendant points to such matters as cost, function, and competition as narrowing the design choices. He stresses 'trade-offs'. If the product would be unworkable when the

> alleged missing feature was added, or would be so expensive as to be priced out of the market, that would be relevant defense matter' (Rheingold, Expanding Liability of the Product Supplier: A Primer, 2 Hofstra L. Rev., 521, 537; see Wirth v. Clark Equip. Co., 457 F. 2d 1262, 9 Cir.; Sutkowski v. Universal Marion Corp., 5 Ill. App. 3d 313, 281 N.E. 2d 749)." Id., 39 N.Y. 2d at 386, 348 N.E. 2d at 577-78.

With specificity, Dean Wade, in his persuasive and widely-quoted article, has outlined the particular factors which the fact-finder must weigh in the final balance:

> "(1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive." J. Wade, Strict Liability of Manufacturers, 19 Sw.

L.J.5(1965).

The efficacy of Dean Wade's approach was delineated by the Florida Supreme Court in Auburn Mach. Works Co., Inc. v. Jones, supra:

> "'Taking the Harper and James formulation as expanded by Dean Wade, it becomes understandable why the plaintiff accidentally injured by a knife does not recover from the manufacturer. The product is not unreasonably dangerous and no duty arises because (1) everyone realizes the dangers; (2) by definition a guard over the blade (the part that causes danger) would eliminate its utility; (3) the cost of a "safe" knife might be prohibitive. Balancing the likelihood and gravity of harm against the burden of protection, a manufacturer should not be liable for a slip of the knife.
>
> "'But consider the Yoder machine. Certainly Dorsey knew the danger of unguarded cutters. On the other hand, a guard would not eliminate the machine's usefulness, nor would the cost of $200 to $500 on an $8,000 machine be unreasonable ... .'
> 331 F. Supp. at 759-60.
>
> "The patent danger doctrine encourages manufacturers to be outrageous in their design, to

eliminate safety devices, and to make hazards obvious. For example, if the cage which is placed on an electric fan as a safety device were left off and someone put his hand in the fan, under this doctrine there would be no duty on the manufacturer as a matter of law. So long as the hazards are obvious, a product could be manufactured without any consideration of safeguards. This example of the fan differs from the example of the knife in Dorsey v. Yoder Co., supra, wherein the court explained that the utility of the knife would be eliminated by placing a guard over the blade. As the New York court in Micallef pointed out in discussing reasonable care, the defendant may show as relevant defensive matter the cost, function, and competition as narrowing design choices, the unworkability of the product when the alleged missing feature is added, or that the product would be so expensive as to price it out of the market.

"The patent danger doctrine protects manufacturers who sell negligently designed machines which pose formidable dangers to their users. It puts the entire accidental loss on the injured plaintiff, notwithstanding the fact that the manufacturer was partly at fault." Id. at 1170-71.

Here, the Court of Appeals correctly held that the fact the danger was open

and obvious was, in view of the nature of the product at issue, only one factor for the jury to consider. As Judge Neal explained for the unanimous Court: "We are of the opinion that the foregoing application of the open and obvious rule will afford some flexibility in meeting the variety of situations which may present themselves." Bemis Co., Inc. v. Rubush, supra, at 57-58.

This more moderate rule does not, as the majority states, convert the strict liability imposed on manufacturers into absolute liability. Brown v. North Am. Mfg. Co., supra. Proof that an accident occurred does not trigger liability of the manufacturer. Neither, however, should the fact that a danger is open and obvious operate as an absolute defense to liability.

Finally, I would note that in enacting our Products Liability Act, which

took effect after the date on which this action was conceived, the legislature rejected by implication the rule adopted here by the majority. See Ind. Code § 34-4-20A-1 et seq. (Burns 1981 Supp.). The defense outlined in Section 4(b)(1) of the act rests on whether the user's conduct was unreasonable in light of the open danger. That question will, with rare exceptions, be a factual matter for the jury to resolve, as are the applicability of the defenses of incurred risk and assumption of risk in negligence actions. See generally, Memorial Hospital of South Bend, Inc. v. Scott, (1973) 261 Ind. 27, 300 N.E. 2d 50; Kroger Co. v. Haun, (1978) ____Ind. App. ____, 379 N.E. 2d 1004.

In Justice DeBruler's dissenting opinion, which I join, he has laid out the evidence from which the jury, pur-

suant to the rule of law explained by the Court of Appeals, could have concluded Bemis Company violated its responsibilities in designing the batt-packer. While the record does reveal conflicts in the evidence and the experts' opinions, we cannot, of course, subjectively evaluate the record and overturn the jury's conclusion, even though we might have reached the opposite result had we been the triers of fact. Meehan v. Meehan, (1981) ___Ind.___, 425 N.E. 2d 157. With respect to the instructions and expert testimony the majority has mentioned, the Court of Appeals fully addressed and correctly decided those issues.

For all the foregoing reasons, Bemis Company, Inc.'s petition to transfer should be denied.

I dissent.

DeBRULER, J., CONCURS.

STATE OF INDIANA

CLERK OF THE SUPREME COURT

AND COURT OF APPEALS

Marjorie H. O'Laughlin, Clerk
217 State House
Indianapolis, Indiana 46204
Telephone 232-1930

No. 1181S319

Bemis Co., Inc. et al V. Gerald G. Rubush, et al

You are hereby notified that the Supreme Court has on this day: Appellee petition for Rehearing is hereby Denied, without Opinion. Givan, C.J. DeBruler, J., dissents. Hunter, J.; I dissent for same reasons already expressed in my original Dissent.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 10th day of Feb., 1982.

Marjorie H. O'Laughlin, Clerk
Supreme Court & Court of Appeals

IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

BEMIS COMPANY, INC. and WABASH PRODUCTS, DIVISION OF BEMIS COMPANY CO., INC.,	)	Filed March 4, 1980 with Marjorie H. O'Laughlin, Clerk of the Supreme and Court of Appeals
Defendants-Appellants,	)	
-v-	)	
GERALD C. RUBUSH and PHYLLIS C. RUBUSH,	)	No. 1-877 A 164
Plaintiffs-Appellees.	)	

APPEAL FROM THE HANCOCK COUNTY CIRCUIT COURT
The Honorable Wesley W. Ratliff, Jr.,
Special Judge

NEAL, J.

On October 19, 1971, Gerald G. Rubush (Gary) was working as a bagger on a fiberglass insulation batt packing machine for Johns-Manville Corporation. The batt packing machine was designed by Bemis Company, Inc. and Wabash Products,

Division of Bemis Co., Inc. (both hereinafter referred to as Bemis). While performing his work as a bagger on the batt packer, and in the course of the batt packer's operation, Gary was struck in the head by a moving part of the machine. This moving part was called a shroud, and it was a visible moving part of the batt packing machine. The blow to the head caused Gary to suffer serious injuries to his skull and brain.

As a result of the injury, Gary and his wife, Phyllis C. Rubush (Phyllis), filed suit against Bemis for personal injuries sustained by Gary, and for loss of services sustained by Phyllis, on a theory of strict liability in tort under §402A of the Restatement (Second) of Torts (1965). The jury returned a verdict for Gary for $750,000 and for Phyllis for $25,000, and thereafter, the trial court entered a judgment on the verdict. Bemis

then filed a timely motion to correct errors, which was denied. This appeal results.

We affirm in part and reverse in part.

In its motion to correct errors, Bemis presents the following issues for our review:

> I. Whether the trial court erred when it precluded Bemis from ascertaining during voir dire whether prospective jurors would follow a rule of strict liability that a manufacturer is not liable for injuries that result from open and obvious dangers.
>
> II. Whether the trial court erred when it stated before the jury that a manufacturer cannot, as a matter of law, evade liability in strict liability for injuries caused by open and obvious dangers in product design.
>
> A. Whether the trial court erred in refusing Bemis' Tendered Instruction Nos. 4 and 5, stating that the Indiana rule of strict liability precludes liability when the danger is open and obvious.
>
> B. Whether the trial court erred by giving its Instructions Nos. 7 and 8 which instructed the jury that the open

and obvious nature of the danger was not a defense in strict liability and that Bemis could be found liable in strict liability even though the danger was open and obvious.

III. Whether the instructions to the jury, considered as a whole, fairly and adequately instructed the jury on the applicable laws without substantial prejudice to Bemis, particularly:

A. Whether the trial court erred in refusing to define 'unreasonably dangerous' under the strict liability theory pursuant to Bemis' Tendered Instruction No. 3, or by so instructing the jury sua sponte as required by Ind. Rules of Procedure, Trial Rule 51(B).

B. Whether the trial court erred by giving its Instruction No. 10 which stated that Bemis would be liable for failure to warn of any design danger, and not merely those which would be 'unreasonable' in the absence of a warning.

C. Whether the trial court erred in giving Instruction No. 8 which assumed that it was proper for Gary to be in the path of the batt packer's moving part which injured him when, in fact, such issue was contested, and, allegedly, an issue for the jury.

D. Whether the trial court erred by giving its Instruction No. 14 which stated that to find for Bemis, the batt packer must have been found to be neither defective nor unreasonably dangerous at the time of the accident.

E. Whether the trial court erred in refusing to give Bemis' Tendered Instruction No. 7 which stated that Bemis could prevail despite a finding that the batt packer was "defective and unreasonably dangerous" if there was some intervening cause in the causal chain of events leading up to Gary's injury.

F. Whether the trial court erred in giving its Instruction No. 12 which stated that Gary's voluntary encounter with a known danger would not be a defense where the ordinarily prudent person would take the risk if ordered to do so by his employer.

IV. Whether the trial court erred in its rulings on evidentiary matters, or whether such rulings were within the court's discretion and were consistent with substantial justice, specifically:

A. Whether the trial court erred by refusing to allow the impeachment of one Gary Mackey, either by prior inconsistent

statements or by contradicting his in-court statements, and by refusing to allow the impeachment of one Virgil Mahoney by use of prior inconsistent statements.

B. Whether the trial court erred in allowing Virgil Mahoney to testify concerning the annual wages of different job classifications of Johns-Manville employees when the best evidence of such wages would have been actual payroll records.

C. Whether the trial court erred in admitting expert testimony which was speculative, without foundation in fact, was based on assumed facts not in evidence, and was irrelevant.

V. Whether the verdict was supported by sufficient evidence.

VI. Whether Phyllis was entitled to recover damages for the loss of consortium and damage to her marriage.

A. Whether the trial court erred in refusing to give Bemis' Tendered Instruction No. 10.

B. Whether the trial court erred in giving its own Instructions Nos. 21 and 31 which allowed Phyllis damages for loss of consortium for periods

subsequent to Gary and Phyllis' divorce.

VIII. Whether the damages awarded to Gary and Phyllis are so excessive as to shock the conscience of the court and are not supported by the evidence.

STATEMENT OF THE FACTS

The facts most favorable to the support of the verdict are as follows: On October 19, 1971, at 3:30 p.m., Gary, age 26, whose job classification was a "bagger," was operating a machine called a batt packer which was designed, manufactured and sold by Bemis to Johns-Manville Corporation in 1969. Gary had only worked ten minutes on his shift when the accident happened.

The ultimate function of the batt packer is to pack batts of insulation into heavy paper bags. This is accomplished in two phases. The first phase is a compression phase during which batts are vertically compressed into the compression chamber of the packer to the approximate size of the open end of the bag into which the batts are to be moved horizontally out of the compression

chamber. The second phase is the bagging phase during which the bag is filled with compressed batts which have been horizontally pushed from the compression chamber to the shroud assembly area through a square opening in the base of the wall of the compression chamber called a "bag spout." The bagger places the open end of the bag around the mouth of the bag spout and the bag is secured to the mouth of the metal bag spout by a bag clamp. The bag clamp is activated by a push button by the bagger after he places the bag over the mouth of the bag spout. Activation of the bag clamp also activates a seven foot long metal shroud which is located about seven feet directly in front of the bag spout. The shroud is hinged on its bottom and on the frame of the batt packer at the level of the top of the bag spout. Upon activation, the shroud, under power, descends in an arc

to a horizontal position above the bag and the very end of the shroud slightly overlaps the bag spout. The function of the shroud is to hold and to furnish support to the paper bag as it is being filled with batts, to prevent the bag from being torn or ripped. Sometimes it was necessary to hold the bag on the bag spout with the hand until the bag clamp set.

The machine had dual push-button controls, each set consisting of the activating button and an emergency stop button, a set of controls being situated on each side of the machine within reach of the bagger as he placed the bag over the bag spout. In typical operation the bagger would place the open end of the bag over the mouth of the bag spout. This would necessitate his being within the arc of the shroud at that time. He would then punch the push-button which would activate the bag clamp which would

set instantly to hold the bag in place. The shroud, being activated at the same time, would commence its descent to a horizontal position, which descent would take four or five seconds.

There was evidence from which the jury could conclude that at the time of the injury Gary had somehow got his hand caught under the bag clamp and was unable to extricate himself to avoid the descending shroud. The shroud caught Gary's head between its end and the bag spout causing severe injuries.

There was evidence that no instructions had been provided by Bemis regarding the specific speed of the shroud's descent, nor warnings regarding the dual controls. There was evidence that no warning was given by Bemis regarding the dangers incident to the shroud's activation. There was evidence that there existed at the time of the manufacture

and sale of the machine, feasible and economic safeguards. There was available a two-button control, one for the bag clamp, and a second one for the shroud descent. There were various guards available, and also a single activating button which would be positioned out of the reach of the bagger while he was under the shroud.

As a result of Gary's being struck by the descending shroud, his head was punctured, driving skull fragments into his brain and causing an open wound from which brain matter extruded. Puncture wounds were inflicted in the left temple region and on his chin. Doctors installed a plastic plate in his skull, and certain brain tissues, which cannot be regenerated, were removed. Gary, as a result of the injuries, experiences petit mal and grand mal epileptic seizures. His body and face twitch uncontrollably at times, and

one eyelid droops. He cannot maintain normal sexual relations. He suffers from impaired motor and sensory functions on his left side and has 52 percent impairment of functional vision. His physical and mental activities are limited. He should not drive. His personality has been drastically altered, and he is negative, irritable, socially withdrawn and apathetic. He sleeps poorly, and exhibits childlike tendencies and selfish and abusive behavior. He is unemployable but has been continued on at Johns-Manville Corporation out of pity and charity rather than competence. Dr. John Mealy, Jr., described him as being rendered simple-minded. His life expectancy at trial time was 39.10 years.

I, II A, II B and V

Bemis under these headings has raised the argument in avoidance of liability that a manufacturer cannot, as a

matter of law, be held liable in strict liability situations under §402A where the injuries were caused by open and obvious dangers in the product's design. This issue was raised on voir dire, in the instruction phase of the trial, and in the court's comments before the jury. It is further raised in specification V that the verdict is not sustained by the evidence. All of the assignments of errors will be discussed together as they involve the same question of law.

The pivotal argument advanced by Bemis is that the functions of the machine were apparent, and the dangers attendant thereto were open and obvious to any person using it, including Gary, an experienced bagger.

The open and obvious rule finds support in Indiana cases, and cases decided in the Seventh Circuit Court of

Appeals applying Indiana law in diversity. The rule may be stated generally as follows: In area of products liability, based upon negligence or based upon strict liability under §402A of the Restatement (Second) of Torts, to impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product. Although the manufacturer who has actual or constructive knowledge of an unobservable defect or danger is subject to liability for failure to warn of the danger, he has no duty to warn if the danger is open and obvious to all. See Huff v. White Motor Corporation, 565 F.2d 104 (7th Cir. 1977); Burton v. L. O. Smith Foundry Products Co., 529 F.2d 108 (7th Cir. 1976); Posey v. Clark Equipment Company, 409 F.2d 560 (7th Cir. 1969); Indiana National Bank of Indianapolis v.

DeLaval Separator Co., 389 F.2d 674 (7th Cir. 1968); Cates v. Jolley, (1978) Ind., 373 N.E.2d 877; Humsberger v. Wyman, (1966) 247 Ind. 369, 216 N.E.2d 345; J. I. Case Company v. Sandefur, (1964) 245 Ind. 213, 197 N.E.2d 519; Nissen Trampoline Company v. Terre Haute First National Bank, (1975) Ind.App., 332 N.E.2d 820, rev'd on other grounds, 265 Ind. 457, 358 N.E.2d 974.

Bemis argues that the open and obvious concept as recited by the above cases states a separate doctrine, and if the defect is not latent, but is open and obvious, the plaintiff cannot recover regardless of the surrounding circumstances. We disagree. Our reading of the Indiana cases, starting with J. I. Case Company, supra, indicates that the rule was recited in connection with the duty to warn where latent defects exist. Indiana courts have never faced an application of the

rule straight-on. While we admit the viability of the concept, we do not concede the application urged by Bemis.

In addition to the open and obvious rule, various other rules and concepts have been developed by the courts in the application of §402A. At least three types of unreasonably dangerous defects may exist under §402A. A product may be defective because of (1) manufacturing flaws, (2) defective designs, and (3) failure to supply complete information about the product's dangers. Burton, supra. Restatement (Second) of Torts §402A, Comments j and k. A product, although virtually faultless in design, material and workmanship, may be considered defective so as to impose strict liability where the manufacturer fails to discharge a duty to warn or instruct with respect to potential dangers in the

use of the product. Nissen Trampoline Company, supra. A product may fail to meet reasonable safety expectations by failing to cope with foreseeable mishaps, by lacking feasible safety devices. Gilbert v. Stone City Construction Company, Inc., (1976) Ind.App., 357 N.E.2d 738. Misuse of a product and incurred risk are defenses. Dias v. Daisy-Heddon, (1979) Ind.App., 390 N.E.2d 222. Unavoidably dangerous, but useful and desirable, products exist and are marketed, but liability does not attach if adequate warning and instructions are given. Restatement (Second) of Torts §402A, Comment k. We do not intend here to make any exhaustive analysis of the whole field, but suffice to say the foregoing are some of the considerations.

The basic premise for the imposition of strict liability is stated in §402A as

follows:

> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, . . ."

Comment g to §402A adds the following:

> "The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. . . ."

Comment i discusses and defines "unreasonably dangerous" as follows:

> "The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk or harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. This is not what is meant by 'unreasonably dangerous' in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it,

> with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous."

As recited in Comment i, to be actionable under §402A, the injury-producing product must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. It is contemplated by Comment i that people can be harmed by almost any product, but the harm is not actionable unless the product is unreasonably dangerous, that is, dangerous to an extent beyond that

which is contemplated by the ordinary consumer, with the ordinary knowledge common to the community as to its characteristics.

It is to be expected that certain products, whose dangers are obvious and commonly known, such as a sharp knife, an ax, or dynamite, would not be actionable under §402A because, while dangerous, and capable of causing harm, they would not be unreasonably dangerous because their characteristics are contemplated by the ordinary consumer with ordinary knowledge in the community. Prosser, Law of Torts §96, p. 649 (4th ed. 1971). With other products, embodying complex and sophisticated technology, incomprehensible to all but practitioners of the art, the dangers are not so obvious and may not be appreciated by an ordinary consumer with ordinary knowledge in the

community, even though the dangers may be appreciated by the sophisticated.

The proper role of the open and obvious rule is that it is but one of the factors which must be considered in determining whether a product is in a defective condition unreasonably dangerous. This, like the determination of negligence, requires judgment in a given situation. This is a question for the determination of the jury under proper instructions in any given case. Gilbert, supra. The trier must determine from the evidence, including a consideration of evidence of any open and obvious dangerous characteristics of a product, along with other factors, the ultimate question of whether the product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer, with the ordinary knowledge common to the community.

The trier may also consider from the evidence, if relevant to the particular case, what an ordinary consumer may contemplate in regard to a product, what is ordinary knowledge of a product in a community, whether feasible safeguards exist, whether the plaintiff appreciated the danger or incurred the risk, whether the product was misused, whether proper warning was given, whether the product was unavoidably dangerous, and any other relevant factors, in determining the ultimate question of whether the product was in a defective condition unreasonably dangerous, that is, dangerous to an extent beyond that which is contemplated by the ordinary consumer, with the ordinary knowledge common to the community as to the product's characteristics.

We are of the opinion that the foregoing application of the open and obvious

rule will afford some flexibility in meeting the variety of situations which may present themselves.

The open and obvious rule has further application where the defense of incurred risk is asserted. Incurred risk is concerned with voluntariness and involves a mental state of venturousness. It has a subjective quality. Incurred risk is concerned with a user's age, experience, knowledge and understanding, as well as the obviousness of the defect and the danger is poses. Kroger Company v. Haun, (1978) Ind.App., 379 N.E.2d 1004.

Here the trial court refused to give Bemis' Tendered Instructions Nos. 4 and 5 which would have told the jury that if the dangers were open and obvious, the plaintiff was precluded from recovery, and that Bemis was not required to furnish safeguards or warnings if the danger was open and obvious. The court instead

instructed the jury by the court's Instruction No. 7 that a product may be defective and unreasonably dangerous because of design deficiencies, and inadequacies in warning and/or instructions for the use and handling of the product. The court instructed the jury by its Instruction No. 8 that if the batt packer was defective in that there was no guard system to prevent the shroud from descending upon a person under its arc, and that no adequate warning was given, the fact that the danger was open and obvious would not necessarily and in and of itself deny recovery under §402A. The instruction further told the jury that they could consider any open and obvious characteristics of the machine in determining whether the machine was defective and unreasonably dangerous, and whether

the plaintiff incurred the risk of injury from that condition.

In view of the foregoing discussion, we are of the opinion the rulings on the instructions and on voir dire, and the statements before the jury in regard to the open and obvious rule were not error.

In regard to Bemis' assignment of errors that the verdict was not supported by sufficient evidence, where the sufficiency of the evidence is questioned on appeal, the reviewing court will not weigh the evidence but will consider only the evidence most favorable to the appellee, together with all of the reasonable inferences to be drawn therefrom. Shipley v. City of South Bend, (1978) Ind.App., 372 N.E.2d 490; Department of Commerce v. Glick, (1978) Ind.App., 372 N.E.2d 479. The Court of Appeals will affirm the judgment if it can be sustained upon any theory. City

of Fort Wayne v. Bishop, (1950) 228 Ind. 304, 92 N.E.2d 544; Monumental Life Insurance Company v. Hakey, (1976) Ind.App., 354 N.E.2d 333.

Under this assignment Bemis reiterates its argument relative to an open and obvious rule, which we have discussed above. Suffice to say here, there was evidence of probative value from which the jury could conclude that feasible safeguards existed, and their absence rendered the machine unreasonably dangerous. The evidence does not disclose that such an open and obvious danger existed that, as a matter of law, the machine was not in a defective condition, unreasonably dangerous. The jury was not compelled to conclude that the possibility of getting his hand caught in the bag clamp, thus preventing escape from the shroud in its descending arc, was sufficiently open and obvious that it

precluded the plaintiff's recovery, even though the injury-producing operations of the shroud were open and obvious.

III A

Bemis alleges that the trial court committed reversible error in refusing to define "unreasonably dangerous" under the strict liability theory, as defined by its Tendered Instruction No. 3. We do not agree with Bemis' contention.

As stated in Barnes v. Deville, (1973) 155 Ind.App., 387, 293 N.E.2d 54, 57:

> "It is a well settled rule in Indiana that, where instructions adequately and fully instruct the jury on the issues of the case, it is not necessary to repeat or duplicate instructions. The rule is also well settled that an instruction may be properly refused even though it is a correct statement of the law and is supported by evidence, where other instructions have sufficiently covered the area."

So long as the instructions considered as a whole fairly and clearly present the law, it may not be presumed that the jury

was misled. Moore v. Rose-Hulman Institute of Technology, (1975) 165 Ind.App. 165, 331 N.E.2d 462.

The court informed the jury that they must find the batt packer unreasonably dangerous in order to allow Gary to recover in Instructions Nos. 1, 2, 6, 7, 8, 9, 14 and 15. The court further instructed, in Instruction No. 1, that the batt packing machine must be "dangerous to an extent beyond that which would be contemplated by an ordinary consumer who purchased the batt packer or for those whose use it was intended." Additionally, Instruction No. 7 provided:

> "A product may be defective and unreasonably dangerous, because of design, deficiencies or inadequacies and/or because of deficiencies or inadequacies in warnings and/or for instructions for the use and handling of the product."

Finally, Instruction No. 15 informed the jury that:

> "There is no duty or obligation upon the manufacturer and seller of a product to produce a completely fool-proof or accident proof product, and no such duty rested upon the defendant with regard to the Batt Packer in this case. Defendant's duty to the purchaser and user of the number 18000-58 Batt Packer in this case was to produce and deliver a machine which was reasonably safe for its intended use and which was not defective and unreasonably dangerous to the user of the machine."

We think that the instructions, taken as a whole, fairly, and adequately defined and conceptually represented to the jury the term "unreasonably dangerous."

III B

Bemis next alleges that it was error for the court to give Instruction No. 10 which stated that:

> "Where the seller of a product has reason to anticipate that danger to person or property may result from a particular foreseeable use of that product, the seller is required to give adequate warning of the danger, and a product sold without such adequate warning is in a defective condition. . .,"

Bemis contends the instruction premised

Bemis' liability on a failure to warn of any design danger, instead of on a failure to warn of "unreasonable dangers." Again, we cannot agree with Bemis.

The jury was thoroughly instructed that the product had to be found defective and unreasonably dangerous before liability could attach in Instructions Nos. 1, 2, 6, 8, 9, 15, 16 and 17. They were told that a failure to give adequate warnings could render the product defective in Instructions Nos. 7 and 10. Further, the jury was told that any obvious condition of the product was a factor to be considered in determining whether the product was unreasonably dangerous and whether Gary incurred the risk in Instructions Nos. 11 and 12.

Considering the instructions as a whole, we find that Instruction No. 10 was an adequate statement of the law. See Moore, supra.

III C

Bemis next objects to Instruction No. 8 because it feels the instruction assumes it was proper for Gary to be in the path of the moving part of the batt packer which injured him when, in fact, such issue was for the jury's decision. We fail to see that Bemis' objection to this instruction is relevant.

The instruction here questioned did not make an assumption that Gary was "properly" in the path of the shroud's descent. It in no way removed from the jury the question of fact concerning whether Gary was properly or improperly within the arc of the moving shroud. The instruction in no way indicated that an element of Gary's case was proven or that an aspect of the manufacturer's defense was unprovable. The instruction goes directly to the patent danger rule in

stating: If the batt packer was defective and unreasonably dangerous, and if the jury found that the defective or unreasonably dangerous propensities of the batt packer were patent, then the patency of the danger would not, as a matter of law, preclude Gary from recovery, but such patent conditions should be considered in determining whether the batt packer indeed was defective and whether Gary voluntarily incurred the risk.

That such an instruction was necessary is shown by our discussion in I and II A and B, supra.

III D and E

Bemis alleges that it was error for the trial court to give its Instruction No. 14, which stated in relevant part:

"* * *

> On the other hand, if you find from a preponderance of the evidence that the Batt Packing Machine was not defective and unreasonably

> dangerous, and that the sole cause of Gerald Rubush's injuries was his own negligence, then the plaintiffs cannot recover in this action."

Bemis alleges that the instruction resulted in reversible error because to find for Bemis, the jury had to find two things: 1) that the batt packer was not defective/unreasonably dangerous, and, 2) that Gary was contributorily negligent in causing his injury. Bemis argues that this misstated the law because if Gary's injuries were proximately caused by his own conduct, he could still recover against Bemis.

If Instruction No. 14 were to stand alone before the jury, Bemis' argument would carry more weight; as it is, Bemis' allegation fails to construe the instructions taken as a whole.

Instruction No. 2 informed the jury that for Gary to recover, he had the burden of proving <u>each</u> of four propositions,

two of which follow:

"* * *

3) That the batt packaging machine in question was defective and unreasonably dangerous to the user.

4) That as a proximate cause of the defective and unreasonably dangerous condition of the batt packaging machine in question, the plaintiff Gerald G. Rubush was injured. . . ."

The court then went on to define proximate cause and its relation to the injury in question in Instruction Nos. 5 and 9. Further, the court's Instructions Nos. 5 and 9 explained that if Bemis produced and delivered a machine which was reasonably safe for its intended use and which was not defective or unreasonably dangerous to the user of the machine, then it could not be held liable for the user's injuries.

In determining the propriety of instructions given in a case, they must be considered as a whole and with reference

to each other and not as isolated independent instructions. Instructions are sufficient if, considering them as a whole, the jury has been fully and fairly instructed. Moore, supra. We feel that the instructions here given did fairly instruct the the jury and that Instruction No. 14 was not error.

III F

Bemis' next allegation of error is the court's giving of Instruction No. 12 which instructed the jury that in determining whether Gary Rubush incurred the risk of his injury, the jury could consider that a factory worker assigned to operate a particular machine known by him to be dangerous does not necessarily incur the risk of his injury if the nature of his employment requires exposure to certain hazards and if the apparent danger is such that a man of ordinary prudence would take

the risk in order to comply with his employer's order. Bemis contends this misstated Indiana law on the doctrine of incurred risk by telling the jury that the employer's order to operate the batt packer would relieve Gary of the consequences of his own action and by implying that such an order militated against a finding that Gary incurred the risk of operating the machine dangerously. In short, Bemis argues that the instruction informed the jury that one does not act voluntarily if one, of his own volition, undertakes a dangerous act because he fears losing his job or incurring his employer's displeasure if he refuses to do the act.

We believe Bemis' interpretation of the thrust of this instruction is incorrect. The court said that acceptance of an assignment to a machine known to be

dangerous is not necessarily incurrence of the risk. The use of the word "necessarily" implies that acceptance of the assignment weighs heavily as an indication that the worker incurred the risk of injury, but that there are instances where such incurrence of risk should not be found, those instances being where the nature of the employment mandates that a worker expose himself to certain hazards and where an ordinary prudent man would recognize these hazards and their unavoidability and would nonetheless assume, and reasonably so, the risk of being injured in the line of work. We do not find this to be an incorrect statement of the Indiana law of incurred risk as applicable to the case at bar.

Bemis' reliance on Meadowlark Farms, Inc. v. Warken, (1978) Ind.App., 376 N.E.2d 122, both to support its definition of incurred risk as applicable to the case

at bar, and to support its contention that an employee assumes all the risks of which he has notice, whether ordinary, or extraordinary, so long as they are incidental to the employment, is ill-placed. Meadowlark Farms, Inc. is a negligence action while the case at bar sounded in strict liability in tort under § 402A.

In Cornette v. Searjeant Metal Products, Inc., (1970) 147 Ind. App. 46, 258 N.E. 2d 652, this court expressly recognized incurred risk as a defense to strict liability under § 402A, citing Comment n to § 402A which demonstrates that such terms as "incurred risk" are often used in a special sense in products liability cases. See 46 A.L.R. 3d 240, at 246. While the defense of incurred risk in negligence law is that one incurs all the ordinary and usual risks of an act upon which he voluntarily enters,

so long as those risks are known and understood by him, Kroger Company, supra, the defense of incurred risk under § 402A is that "[i]f the user... discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery." (Emphasis added.) Comment n to § 402A. Thus, under negligence law, the defense is a subjective one; under strict liability law, the defense is an objective-subjective hybrid. See Kroger Company, supra; Gregory v. White Truck & Equipment Co., Inc., (1975) 163 Ind.App. 240, 323 N.E. 2d 280.

When Instruction No. 11, which defined the defense of incurred risk in an objective-subjective fashion in keeping with Kroger Company, supra, and to which Bemis did not object, is read in conjunction with Instruction No. 12, the

jury was adequately and properly instructed as to the defense of incurred risk and its application to the case at bar. No error can be found in the giving of the challenged instruction.

IV A

Bemis next contends that the court committed error in refusing Bemis the right to impeach the witness, Gary Mackey, by showing prior inconsistent statements allegedly made by the witness out of court. The sequence of events is as follows: Gary Mackey testified. His testimony covered 31 pages in the transcript. In response to a question on cross-examination, he said that he had been interviewed about the accident by Virgil Mahoney about an hour after its occurrence. He further testified that he told Virgil Mahoney the same things he had testified to in court, and denied that he had changed his story. No specific impeaching question was asked. This exchange occurred on the nineteenth page of his testimony.

Later Virgil Mahoney testified and

stated upon cross-examination that he had interviewed witness Mackey. He was then asked what Mackey told him at the first interview concerning what Mackey saw at the scene of the accident. Objection was made by Gary on the ground that if it were an impeaching question, a proper foundation had not first been laid, and if it were not, the evidence was hearsay. This objection was sustained by the court.

An impeaching process of a witness is multistaged. First, the necessary foundation must be laid by calling the witness' attention to the time when, the place where, and the person to whom the contradictory statement was alleged to have been made. Secondly, the statement must be read to the witness, or at least he must be advised of the substance of it. Finally, at some future part of the proceeding the

witness may explain the statement and/or present evidence of prior consistent statements. The purpose of the rule is to give the witness warning to enable him to prepare to disprove it or to explain it away if admitted. Carroll v. State, (1975) 263 Ind. 696, 338 N.E.2d 264; Gradison v. State, (1973) 260 Ind. 688, 300 N.E.2d 67.

Bemis argues that the question asked of Mackey of whether he had told the same story to Mahoney was sufficient to pose the impeaching question. We are of the opinion that the proper foundation was not laid. Mackey's testimony covered 31 pages in the transcript, and he was interrogated on diverse subjects. The impeaching question should be pointed, and call the subject matter to the witness' attention concisely to the area desired.

Bemis further predicates error on the trial court's refusal to permit an

answer to a question submitted to Virgil Mahoney on cross-examination as to whether Mahoney had told Bemis' investigator that Mackey had changed his story. We view this as an indirect attempt to impeach the witness Mackey when he could not impeach him directly because of the failure to lay the proper foundation.

We find no error in the court's ruling in this regard.

IV B

Bemis next challenges as error the court's permitting Virgil Mahoney to testify as to Gary's lost wages and impaired earnings. Virgil Mahoney had been an employee of Johns-Manville Corporation for 30 years and was Gary's supervisor. He testified without objection that he knew the present job that Gary held at Johns-Manville, its hourly rate, and the job Gary had held at the time of the injury, and its hourly rate of pay. He

testified about the incentive pay afforded at the previous position Gary held as a bagger, and that if he had remained at the old job Gary would be making considerably more money, as the present job does not have incentive pay. Bemis objected to a question asked Mahoney as to whether he knew how much more Gary could be making in the old job. There had been testimony that Gary could not perform the old job.

The error asserted is based on the proposition that the best evidence would be the corporate records, and that Bemis was prejudiced in that it was not able to cross-examine the underlying record. Bemis cites Arnett v. Helvie, (1971) 148 Ind.App. 476, 267 N.E.2d 864. This case is not helpful to Bemis. That case concerned a witness who, while being unfamiliar with a particular farm, still attempted to testify about the income off it from his

knowledge of other farms and national averages. The tenants and other persons who were familiar with the farm were available and in the court room. The court ruled that the testimony of witnesses more familiar with the farm was the best evidence.

Citations are not necessary to justify the best evidence rule because of its generality. However, Bemis has not convinced us that Mahoney's testimony was within the rule. His long years of service and knowledge of wage scales, incentive programs, productivity, etc. certainly qualified him to explain such matters to the court and jury. The remainder of his testimony was a simple mathematical calculation. Questions concerning the competence and qualifications of a witness and the admissibility of evidence are addressed to the sound discretion of the trial court. No

abuse of that discretion has been shown, and the court's ruling thereon is not error.

IV C

Bemis next asserts that the trial court erred in admitting testimony which was speculative, was without foundation in fact, was based upon assumed facts not in evidence, and was irrelevant. This assignment of alleged error concerned the testimony of Dr. Richard L. Fox and Dr. Thomas Manos. Both witnesses are licensed engineers and are professors of mechanical engineering specializing in machine design. Their expert opinions were based upon examination of the machine, its instruction and service manuals, plans and drawings, photographs, study of the operation of the machine, movie film, experiments with the machine, and measurements. Based upon these studies each concluded that

the machine was not reasonably safe for its intended use.

The trial court is vested with broad discretion in determining both the qualifications of experts and the nature of admissible testimony. Hartzler v. Chesapeake and Ohio Railway Company, 433 F.2d 104 (7th Cir. 1970); Lengyel v. Hecht, (1968) 143 Ind.App. 660, 242 N.E.2d 135. Exercise of such discretion will not be reversed unless a clear abuse thereof is shown. City of Bloomington v. Holt, (1977) Ind.App., 361 N.E.2d 1211. Bemis has not demonstrated any such abuse of discretion, and we find no error in the court's ruling.

VI A and B

Bemis' next allegation of error is that the trial court erred in refusing Bemis' Tendered Instruction No. 10 and in giving the court's Instructions Nos. 21

and 31. Bemis' instruction would have instructed the jury that the period of time for which Phyllis Rubush could be compensated for loss of consortium ended with the pretrial dissolution of her marriage to Gary. The court, however, instructed the jury that, if it found that the dissolution of the Rubush marriage was a proximate result of Gary's injuries, the jury could consider as an element of any damage to Phyllis the value of her loss of consortium after the date of the dissolution.

Consortium is a right growing out of the marital relation, 41 C.J.S. Husband and Wife § 11 (1944), and is defined in Black's Law Dictionary 712 (rev. 4th ed. 1968) as:

> "[c]onjugal fellowship of husband and wife, and the right of each to the company, cooperation, affection, and aid of the other in every conjugal relation."

In Troue v. Marker, (1969) 253 Ind. 284, 252 N.E.2d 800, our Supreme Court recognized for the first time in Indiana a wife's independent cause of action for loss of consortium due to negligent injury to her husband and defined "consortium," at 291, as "intangible mental and emotional elements" as well as "services and charges which one partner in the marriage performs for the other and [which] have a monetary and pecuniary value", but not including "the monetary value of the direct support owed by a husband to a wife."

Indiana courts have long recognized that where the same wrongful act which caused the loss of consortium also caused the death of the spouse, the period of time for which recovery for loss of consortium may be had is limited to the time between the commission of the injury and the date of the death of the injured

spouse. Burk v. Anderson, (1952) 232 Ind. 77, 109 N.E.2d 407; Long v. Morrison, (1860) 14 Ind. 595. This necessarily implies that the defendant cannot be assessed damages for causing the surviving spouse's widowerhood or widowhood during which the surviving spouse would, without question, be without those benefits from the late spouse covered by the rubric "consortium." Bemis argues that, as with death, dissolution of marriage marks the end of the compensable period for loss of consortium. We agree.

We reject the Rubushes' attempt to justify recovery beyond the end of the marriage by drawing an analogy between this aspect of Phyllis' action and an action for alienation of affection. Our legislature has abolished the civil cause of action for alienation of affection, IND. CODE 34-4-4-1, and our Supreme Court upheld the constitutionality of this

legislative action in Pennington v. Stewart, (1937) 212 Ind. 553, 10 N.E.2d 619.

We do agree that under strict liability in tort, a manufacturer is liable for all injuries proximately caused by a defect in his product but remind the Rubushes that:

> "[t]his requirement of proximate cause is usually phrased in terms of foreseeability of danger or harm, with foreseeability held to mean that which it is objective reasonable to expect, not merely what might conceivably occur."

72 C.J.S. Supp. Products Liability § 30 (1975). The dissolution of the Rubush marriage and the resulting loss by Phyllis of all those benefits covered by the rubric "consortium" would not be harms objectively reasonable to expect from the actions of Bemis in the case at bar regardless of how the Rubushes chose to label Phyllis' cause of action. Further, to allow Phyllis this element of recovery

would be to judicially recognize a cause of action for "wrongful divorce" and this we will not do.

Although the trial court instructed the jury that it could consider the fact of the dissolution and evidence that Phyllis intended to remarry in mitigation of her damages, we must conclude the court's instructions incorrectly stated the law dealing with damages for loss of consortium, and we cannot conclude the jury could not have been misled. Therefore, the court's giving of these instructions was reversible error. See Birdsong v. ITT Continental Baking Company, (1974) 160 Ind.App. 411, 312 N.E.2d 104. We, therefore, need not address Bemis' allegation that the award of damages to Phyllis was excessive.

The award of damages to Phyllis must be reversed and her cause of action for

loss of consortium remanded for a new trial solely on the issue of damages.

VII

Bemis next contends that the damages awarded Gary are excessive.

The amount of recovery, where damages are not a mere matter of computation, is largely within the discretion of the trier of the facts, and will not be disturbed by the reviewing court on the grounds of excessiveness unless the award is so grossly, outrageously great as to indicate prejudice, partiality, corruption or other improper motive. Palace Bar, Inc. v. Fearnot, (1978) Ind.App., 376 N.E.2d 1159, rev'd on other grounds, Ind., 381 N.E.2d 858; Jos. Schlitz Brewing Company v. Central Beverage Co., Inc., (1977) Ind.App., 359 N.E.2d 566. The amount assessed must appear to be so outrageous as to impress the court at first blush

with its enormity. The fact that a trial court or jury assessed higher damages than this court would have assessed is no reason why the judgment should be set aside. Swift and Company v. Palmer, (1967) 141 Ind.App. 378, 228 N.E.2d 38.

With the foregoing standards of review in mind, and in view of the evidence of Gary's age, prior good health, his capacity for vigorous activity, the substantial evidence, both from lay and professional witnesses as to the critical and permanent nature of the injuries, as recited in the statement of facts, we cannot say that the damages are excessive as a matter of law.

For the above reasons, the judgment in favor of Gerald G. Rubush is affirmed; the judgment in favor of Phyllis C. Rubush is reversed, and a new trial ordered on damages only.

Affirmed in part; reversed in part.

ROBERTSON, P. J. and YOUNG, J. (Participating by Designation) CONCUR.

IN THE SUPREME COURT OF INDIANA

NO. 1181 S 319

(On Transfer From The
Court of Appeals of Indiana)

BEMIS COMPANY, INC., and Wabash Products, Division of Bemis Company, Inc.	Court of Appeals No. 1-877A164
Defendants-Appellants	Appeal from the Hancock Circuit Court
v.	The Honorable Wesley W. Ratliff, Jr., Special Judge
GERALD G. RUBUSH and PHYLLIS C. RUBUSH,	
Plaintiffs-Appellees	

APPELLEES' PETITION FOR REHEARING

Gerald G. Rubush and Phyllis C. Rubush, plaintiffs-appellees, respectfully petition the Court to grant a rehearing in the above-entitled cause.

This Court granted transfer and decided this appeal adversely to the Plaintiffs-Appellees in a 3-2 Majority

Opinion filed on November 12, 1981. That Opinion vacated the unanimous opinion of the First District Court of Appeals affirming the jury verdict and judgment below (401 N.E.2d 48). In its Majority Opinion, this Court not only reversed the judgment in favor of these plaintiffs, but also directed the trial court to enter judgment in favor of the defendants as a matter of law.

The Plaintiffs-Appellees respectfully represent that the Court erred in its Opinion and Decision in the following respects:

1. The Majority Opinion appears to be premised upon a misunderstanding of plaintiffs' position regarding the "obviousness" of the dangers associated with batt packer design and automatic shroud descent (Majority Opinion, pp. 5, 10).

Contrary to the statements of the Court, Appellees do not admit, and the evidence does not show, "that the descent of the shroud was an open and obvious danger which was well known to the operators of the machines and which would be obvious to anyone observing the machine." The Appellees do not admit, and the evidence does not show that "The operator of the machine was familiar with and aware of the dangers in the descending shroud."

It has always been, and remains, the Appellees' position that the dangers associated with the design of the Bemis batt packer, with the automatically descending shroud, are latent dangers not readily observable and appreciable by the user. With respect to Gary Rubush, a fair reading of the Record shows that he has no memory whatever of his pre-injury employment or operation of the batt packer.

Neither he nor anyone on his behalf has ever suggested that the dangers inherent in this product's design, including those associated with automatic shroud descent, are open or obvious.

Thus, contrary to the assumption of the Majority Opinion, a legitimate fact question exists on this issue.

2. The Majority Opinion appears to be based upon an inadvertent misreading of the facts in the Record (e.g., Majority Opinion, pp. 3-6, 9-11).

The Majority Opinion misstates evidence in the Record, views evidence solely in a light most favorable to the defendants-appellants, and substitutes its personal view of the evidence for that of the trier of fact, all in contravention of previously well-settled and controlling Indiana rules of appellate review stated in such cases as:

Mutual Benefit Health & Acc. Ins. v. Keiser (1938), 214 Ind. 472, 14 N.E.2d 707

New York C. R. Co. v. Thompson (1939), 215 Ind. 652, 21 N.E.2d 625

Marion Trucking Co. v. McDaniel Freight Lines (1952), 231 Ind. 519, 108 N.E.2d 884

In Re: Adoption of Jackson (1972), 257 Ind. 588, 277 N.E.2d 162

3. The Majority Opinion directs the entry of judgment as a matter of law, despite the existence of disputed material fact issues in contravention of Indiana Trial Rule 50 and such controlling Indiana precedents as:

Huff v. Travelers Indem. Co. (1977) 266 Ind. 414, 363 N.E.2d 985

Vernon Fire & Cas. Ins. Co. v. Sharp (1976), 264 Ind. 599, 349 N.E.2d 173

State ex rel. Peters v. Bedwell (1978), 267 Ind. 522, 371 N.E.2d 709

In this case, there is at least conflicting evidence and legitimate factual disputes

as to whether the dangers inherent in product design are open and obvious, whether the danger associated with the automatically descending shroud is open and obvious, whether Gary Rubush unreasonably incurred the risk, etc.

4. By summarily and arbitrarily depriving Phyllis and Gary Rubush of an opportunity to litigate their vested cause of action, the decision of this Court violates fundamental principles of due process and equal protection.

Boddie v. Connecticut (1971), 401 U.S. 371

Cf. Dague v. Piper Aircraft Corp. (1981) ___Ind.___, 418 N.E.2d 207

5. The Majority Opinion erroneously finds reversible error in the course of the proceedings below covering matters which are characterizable, at worst, as harmless error (e.g., Majority Opinion, pp. 8-10). Indiana Trial Rule 61.

Because, even under the standards announced in the Majority Opinion, the Record leaves no doubt that the right result was reached and substantial justice was done, the judgment of the trial court in favor of plaintiffs should be affirmed.

6. The Majority Opinion erroneously decides a new question of law; namely, what role, if any, the so-called Campo doctrine will have in the Indiana law of strict liability in tort.

For the reasons stated by Justice Hunter in his dissenting opinion, in which Justice DeBruler concurs, the so-called open and obvious rule adopted by the Majority Opinion is contrary to both the spirit and letter of § 402A strict liability law and is incompatible with the fundamental principles of Indiana

products liability law enunciated in virtually every recent major products liability decision by Indiana Appellate Courts, including the following:

Gilbert v. Stone City Constr. Co., Inc. (1976) ___Ind.App.___, 357 N.E.2d 738

Perfection Paint & Color Co. v. Konduris (1970), 147 Ind.App. 106, 258 N.E.2d 681

Craven v. Niagara Mach. & Tool Works, Inc. (1981), ___Ind.App.___, 417 N.E.2d 1165

Conder v. Hull Lift Truck, Inc. (1980), ___Ind.App.___, 405 N.E.2d 538

Petroski v. Northern Ind. Pub. Serv. Co. (1976), ___Ind.App.___, 354 N.E.2d 736

Moore v. Federal Pac. Elec. Co. (1980), ___Ind.App.___, 402 N.E.2d 1291

Wherefore, plaintiffs-appellees pray that they be granted a rehearing. Upon reconsideration, this Court should adopt as its Opinion either the dissenting Opinions of Justices DeBruler and Hunter or the unanimous opinion of the Court of Appeals published at 401 N.E.2d 48. The

judgment in favor of Phyllis and Gary Rubush should be affirmed. In the alternative, at the very least and regardless of any legal principles adopted, the matter should be remanded for new trial, along with any other relief proper in the premises.

Respectfully submitted,

By /s/ Peter G. Tamulonis
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STATE OF INDIANA

COUNTY OF HANCOCK

IN THE HANCOCK CIRCUIT COURT

CAUSE NO. 35636

GERALD G. RUBUSH and PHYLLIS C. RUBUSH,	)
Plaintiffs,	)
-vs-	)
BEMIS COMPANY, INC. and WABASH PRODUCTS, DIVISION OF BEMIS COMPANY, INC.,	)
Defendants.	)

PLAINTIFFS' STATEMENT OF CLAIM, SPECIFICATION OF DEFECTS, SUPPLEMENTAL SUGGESTED ISSUES OF LAW AND SPECIFICATION OF DAMAGES

. . . SPECIFICATION OF DEFECTS

The machine was defective in the following respects:

1. The shroud could descend with an operator or other person in its sweep arc and thus contact such operator or person.

2. It contained no device which would prevent the shroud from descending if someone was in the shroud area.

3. It contained no automatic shut-off device that would have stopped the shroud if it struck someone while it was descending.

4. The controls which activated the bag clamps and shroud were located too close to the sweep arc of the shroud.

5. The bag clamps and shroud were activated by one button, that is, the descent of the shroud was automatic once the bag clamps were activated.

6. It contained two separate sets of controls, one on each side of the shroud, either of which would independently activate the bag clamps and shroud.

7. The bag clamps and shroud could be activated while a person was within the sweep of the arc of the shroud and with

a hand under the bag clamp.

8. The controls which activated the bag clamps and shroud were too close to the bag clamps.

9. The shroud speed controls permitted adjustments without reasonable limitation.

10. There were no instructions in the instruction manual or on the machine concerning the maximum speed at which the shroud control mechanism should be set for safe operation.

11. There were no instructions contained on the machine or in the instruction manual for safe operation of the machine.

12. There were inadequate instructions for the operation and use of the machine.

13. There were inadequate warnings regarding the hazards involved in using the machine.

14. It contained no guards which would prevent persons from being caught in the area where the shroud descended.

15. It contained no electric eye curtains or devices that would have prevented the shroud from descending if someone were in the shroud area.

16. It did not contain a system whereby the operator would be required to push two buttons both sufficient distance from the shroud area before the bag clamps or shroud would descend, thus preventing any part of the operator's body from being in the area of the shroud when it descended.

17. It contained no barrier guards or interlock devices which would have prevented a person from being in the shroud area when the shroud descended.

18. It used an automatic time delay mechanism to control the beginning of descent of the shroud without safeguards

to prevent the shroud from descending with a person under the shroud and without adequate controls for the speed and descent of the shroud.

19. There were inadequate instructions in the instruction manual regarding the setting of the automatic time delay between activation of bag clamps and beginning of descent of the shroud.

20. There was inadequate testing of the machine prior to sale. . . .

FINAL INSTRUCTIONS OF THE HANCOCK COUNTY CIRCUIT COURT

FINAL INSTRUCTION NO. 1

"This is a civil action brought by the plaintiffs Gerald G. Rubush and Phyllis C. Rubush against the defendants Bemis Company, Inc. and Wabash Products, Division of Bemis Company, Inc., wherein the plaintiff Gerald G. Rubush seeks to recover damages for personal injuries allegedly sustained on October 19, 1971, and the plaintiff Phyllis C. Rubush, who was at the time of said injury and until June 3, 1975, the wife of the plaintiff Gerald G. Rubush, seeks to recover damages for the loss of consortium of her husband as the result of his injuries.

The plaintiffs contend that on the date in question, Gerald G. Rubush was employed as a bagger in the operation of a batt packaging machine manufactured by the defendants, and which had been sold to plaintiff's employer, Johns-Manville Corporation. Plaintiffs contend that the batt packaging machine in question reached the plaintiff without substantial change in the condition in which it was sold to plaintiff's employer, and that plaintiff Gerald G. Rubush was struck in the head by a part of the machine known as a shroud and was injured thereby. Plaintiffs contend that the machine was defective and unreasonably dangerous,

and that the defective and unreasonably dangerous condition of the machine was the proximate cause of the plaintiff Gerald Rubush's injuries, and they assert that the defendants are strictly liable for the plaintiffs' injuries and damages.

The plaintiffs contend that as the result of the injuries, the plaintiff Gerald G. Rubush suffered the following permanent injuries:

1. Fractured skull
2. Brain injury including:
    a. Post-traumatic craniocerebral injury and encephalopathy
    b. Lacerations of the brain
    c. Loss of part of the brain
    d. Post-traumatic epilepsy with seizures
    e. Intellectual impairment
    f. Emotional, psychological and psychiatric injury
    g. Loss of the left field of vision in both eyes (Left homonymous hemianopsia)
    h. Left sided neurosensory loss, weakness, impaired sensory function and impaired use of left side
    i. Double vision
    j. Marked dysphasia or impairment of speech
    k. A plate in his head
    l. Ptsosis or drooping of left upper eye lid

3. Injury to his sense of taste and smell

5. Loss of part of his skull

Plaintiffs contend that Gerald Rubush has a permanent impairment of at least 55 per cent of the man as a whole, and contend that all of said injuries were proximately caused by the defective and unreasonably dangerous condition of the batt-packaging machine manufactured by the defendants. Plaintiffs further state that the plaintiff Gerald Rubush has lost income of approximately $20,000.00, and that he will lose income in the future. Plaintiffs seek to recover damages in the amount of One Million Dollars ($1,000,000.00) for Gerald G. Rubush and Two Hundred, Fifty Thousand Dollars ($250,000.00) for Phyllis C. Rubush.

The defendants, by way of defense to this action, deny that the batt-packaging machine was either defective or unreasonably dangerous. They further deny that plaintiffs' injuries and damages occurred during an intended and normal use of the batt packaging machine. They further deny that the batt packaging machine was dangerous to an extent beyond that which would be contemplated by an ordinary consumer who purchased the batt packer or for those whose use it was intended. Defendants further deny that there was any alleged defect or unreasonably dangerous condition in respect to the batt packaging machine that existed at the time of

sale which proximately resulted in plaintiffs' injuries and damages. Defendants further contend that plaintiffs' injuries and damages are the result of an intervening cause resulting from the acts and omissions of others, and that plaintiff Gerald Kubush incurred the risk involved. The defendants further contend that plaintiffs' injuries and damages were the proximate result of misuse or abnormal use of the batt packaging machine.

The defendants ask that plaintiffs take nothing by this action.

These are the issues which you are to try and determine in this action.

FINAL INSTRUCTION NO. 2

In order to recover in this action, the plaintiffs have the burden of proving, by a fair preponderance of the evidence, each of the following propositions:

1. That the batt packaging machine in question was manufactured and sold by the defendants to the plaintiff's employer, Johns-Manville Corporation, and that the defendants were in the business of selling such machines.

2. That the batt packaging machine in question reached the user without substantial change in the condition in which it was sold, and that it was in substantially the same condition as when sold on October 19, 1971.

3. That the batt packaging machine in question was defective and unreasonably dangerous to the user.

4. That as a proximate cause of the defective and unreasonably dangerous condition of the batt packaging machine in question, the plaintiff Gerald G. Rubush was injured on October 19, 1971.

If you find from a consideration of all of the evidence in this case that the plaintiffs have proved each of the foregoing propositions, by a fair preponderance of the evidence, you should find for the plaintiffs. On the other hand, if you find that any of the foregoing propositions have not been proved by a fair preponderance of the evidence, or if you further find from a preponderance of the evidence that the plaintiff Gerald G. Rubush voluntarily incurred the risk of injury, or if you further find by a fair preponderance of the evidence that the injury to plaintiff Gerald G. Rubush was caused by an efficient intervening cause which superseded any defective and dangerous condition of the machine, so that the intervening cause, and not the defective and dangerous condition of the machine was the proximate cause of plaintiff's injuries, then you should find for the defendants.

FINAL INSTRUCTION NO. 3

When I say that a party has the "burden of proof" on any issue or use the expression, "if you find from a

preponderance of the evidence," I mean that you must be convinced from a consideration of all the evidence in the case that the issue which a party has the burden of proving is more probably true than not true.

FINAL INSTRUCTION NO. 4

The term "preponderance of the evidence" means the weight of the evidence. The number of witnesses testifying to a fact on one side or the other or the quantity of evidence introduced on one side or the other is not necessarily of the greater weight. The evidence given upon any fact in issue which convinces you most strongly of its truthfulness is of the greater weight.

FINAL INSTRUCTION NO. 5

The term "proximate cause" means that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury complained of and without which the result would not have occured.

FINAL INSTRUCTION NO. 6

You are instructed that it is the law in the State of Indiana that one who manufactures, sells, or otherwise distributes any product in a defective condition unreasonably dangerous to the user of the product is subject to liability for damages thereby proximately caused to the user, if

(a) The manufacturer, seller, or distributor is engaged in the business of manufacturing or selling such a product, and

(b) The product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

You are further instructed that this rule applies even though the manufacturer, seller, or distributor is free from negligence and has exercised all possible care in the preparation and sale of his product.

FINAL INSTRUCTION NO. 7

A product may be defective and unreasonably dangerous, because of design, deficiencies or inadequacies and/or because of deficiencies or inadequacies in warnings and/or for instructions for the use and handling of the product.

FINAL INSTRUCTION NO. 8

If you find that the batt packaging machine in question was defective and unreasonably dangerous in that there was no guard system to prevent the shroud from descending upon a person who happened to be in the bag area and under the descending arc of the shroud, or that the said machine was defective and unreasonably dangerous in that no adequate warning was given to a user of the machine

to properly warn such person that a person inside the bag area and under the descending arc of the shroud was in danger of being struck by the descending shroud, the further fact, if you find it to be a fact, that such defective and unreasonably dangerous condition, if you find such condition to be defective and unreasonably dangerous, was open, apparent, and obvious to the user of the machine, would not necessarily and in and of itself deny recovery on a strict liability theory to a person injured thereby, if you find such condition to be defective and unreasonably dangerous. However, you may consider the fact, if you find it to be a fact, that such condition was open, apparent, and obvious to the user of the machine in determining whether or not the machine was in fact defective and unreasonably dangerous, and in determining whether or not the person working as a bagger on said machine, such as the plaintiff Gerald G. Rubush, voluntarily incurred the risk of injury from such condition.

FINAL INSTRUCTION NO. 9

Several elements may combine to make up the proximate cause of an injury, and in order for the defendant to be liable to the plaintiff, the defective and unreasonably dangerous condition of the machine involved in this case, if you find that the machine was defective and unreasonably dangerous, need not be the sole

proximate cause of Gerald Rubush's injury. It is sufficient if the defective and unreasonable dangerous condition of the machine, if you find that it was defective and unreasonably dangerous, concurring with the negligence of plaintiff's employer or plaintiff's fellow employees, is a proximate cause of Gerald Rubush's injury.

FINAL INSTRUCTION NO. 10

Where the seller of a product has reason to anticipate that danger to person or property may result from a particular foreseeable use of that product, the seller is required to give adequate warning of that danger, and a product sold without such adequate warning is in a defective condition. You are further instructed that under the law, it is presumed that had an adequate warning been given by the manufacturer or seller of a product, it would have been read and heeded. You are further instructed that the burden of rebutting this presumption is placed upon the manufacturer or seller.

FINAL INSTRUCTION NO. 11

Defendant has raised the affirmative defense that plaintiff, Gerald G. Rubush, incurred the risk of his injuries. On that issue, defendant has the burden of proof.

The Doctrine of Incurred Risk under Indiana law is that one incurs all of the normal risks of a voluntary act -- so long as he knows and understands them, or if they are readily discernible by a reasonably prudent person in similar circumstances.

Therefore, even if you find by a preponderance of the evidence that plaintiff, Gerald G. Rubush, was injured as a result of a risk arising out of a defective and unreasonably dangerous condition in the Batt Packer, if you further find that plaintiff knew and understood such risk or that it was a risk which could have been readily discernible by a reasonably prudent person in similar circumstances, and that with such knowledge of the dangerous condition, plaintiff Gerald G. Rubush nevertheless and willfully and unreasonably proceeded to make use of the machine, then said plaintiff would have voluntarily incurred the risk of injury from the dangerous conditions of the machine in question.

FINAL INSTRUCTION NO. 12

In determining whether or not Gary Rubush incurred the risk of his injury, you may consider that a factory worker who is assigned to operate a particular machine that the worker knows is dangerous does not necessarily incur the risk of his injury where the nature of his employment requires exposure to certain hazards and where the apparent danger is such that a man of ordinary prudence would take the risk

in order to comply with his employer's order.

FINAL INSTRUCTION NO. 13

The defendant, as manufacturer of the Batt Packer, was under no obligation to foresee, anticipate, or provide safety guards against a danger that results from a misuse of its Batt Packer; and a use which is different from or more strenuous than that contemplated to be safe by ordinary users or consumers of a product is a misuse that would refute either a defective condition or causation.

However, in order for misuse to be a defense, the misuse must be such that the misuse of the product is the proximate cause of the injury to the user of the product.

FINAL INSTRUCTION NO. 14

Contributory negligence is the failure of a plaintiff to use reasonable care to avoid injury to himself, which failure contributes to the cause of the injuries for which he seeks to recover. However contributory negligence is not a defense in a strict liability case. Therefore the fact, if you find it to be so, that the plaintiff failed to use reasonable care to avoid injury to himself, which failure is a proximate cause of the injuries for which he seeks to recover, it is not a defense to the defendant in this

action which is based upon the legal theory of strict liability in tort, if you find that the machine in question was in fact defective and unreasonably dangerous to the user, and that such defect and unreasonably dangerous condition was the proximate cause of the injury to plaintiff Gerald Rubush.

On the other hand, if you find from a preponderance of the evidence that the Batt Packing Machine was not defective and unreasonably dangerous, and that the sole cause of Gerald Rubush's injuries was his own negligence, then the plaintiffs cannot recover in this action.

FINAL INSTRUCTION NO. 15

There is no duty or obligation upon the manufacturer and seller of a product to produce a completely foolproof or accident proof product, and no such duty rested upon the defendant with regard to the Batt Packer in this case. Defendants' duty to the purchaser and user of the number 18000-58 Batt Packer in this case was to produce and deliver a machine which was reasonably safe for its intended use and which was not defective and unreasonably dangerous to the user of the machine.

If the defendant discharged the duty thus imposed upon it with regard to such machine, defendant cannot be held liable in this case. On the other hand, if the defendant, failed

in its duty and produced and sold the Batt Packing Machine to plaintiff's employer in a defective and unreasonably dangerous condition, and as a proximate result thereof, plaintiff Gerald Rubush was injured, then defendant would be liable for plaintiffs damages.

FINAL INSTRUCTION NO. 16

In order for you to find that the defective and unreasonably dangerous condition of the machine involved in this case was a proximate cause of Gary Rubush's injury, you would not need direct evidence of the precise manner in which the injury occurred if there was circumstantial evidence showing the cause of the injury. Circumstantial evidence consists of proof of certain facts and circumstances from which you may infer other facts which usually and reasonably follow, according to common experience.

FINAL INSTRUCTION NO. 17

You may not find for the plaintiffs simply because of the fact that the incident of plaintiff Gerald Rubush's injury occurred. In order for plaintiffs to recover they must prove by a preponderance of the evidence that the proximate cause of the incident and of the injuries was the fact that the Batt Packing Machine was manufactured, sold and delivered in a defective and unreasonably dangerous condition.

FINAL INSTRUCTION NO. 18

If the injuries to Gerald Rubush were caused by some efficient intervening cause, occurring subsequent to the sale and delivery of the Batt Packing Machine by defendants, which intervening cause superseded and took the place of the defective and unreasonably dangerous condition of the machine, if you find that it was defective and unreasonably dangerous, as the proximate cause of plaintiff's injuries, the fact of the occurrence of such intervening and superseding cause would constitute a defense to this action.

However, in order for an intervening cause to be a defense, such intervening cause must supersede and replace the original cause of the occurrences. If the subsequent cause does not supersede the original cause, but merely contributes to cause the incident, then it is not an intervening cause, and is not a defense.

FINAL INSTRUCTION NO. 19

In considering the evidence in this cause, you are permitted to draw reasonable inferences from the facts proved. A reasonable inference is one which naturally flows from the facts proved.

FINAL INSTRUCTION NO. 20

The right of the plaintiff Phyllis C. Rubush to recover in this action is wholly dependent upon the right of the plaintiff Gerald G. Rubush to recover. In other words, you cannot find in favor of the plaintiff Phyllis C. Rubush unless you also find in favor of the plaintiff Gerald G. Rubush.

FINAL INSTRUCTION NO. 21

Evidence has been introduced showing that the plaintiff Phyllis C. Rubush received a dissolution of her marriage to plaintiff Gerald G. Rubush on June 3, 1975, and further that said plaintiff Phyllis C. Rubush presently plans to re-marry on May 28, 1977. If you find that the dissolution of the marriage of the plaintiffs was brought about and caused by the plaintiff's injuries, and if you further find that the defendants are liable for the injuries to the plaintiff Gerald G. Rubush, the fact of the dissolution of marriage and planned re-marriage of the plaintiff Phyllis C. Rubush would not deny recovery to Phyllis C. Rubush for the loss of consortium of her husband, Gerald G. Rubush, after the date of their divorce; but you may consider the fact that the dissolution of the marriage and Phyllis C. Rubush's intended re-marriage in mitigation of her damages in this case, if you find that she is entitled to recover damages.

FINAL INSTRUCTION NO. 22

You are the sold judges of the weight of the evidence and of the credibility of the witnesses.

In giving weight and credit to the testimony of any witness, you may take into consideration any interest a witness may have in the result of the trial, any bias or prejudice of the witness disclosed by the evidence. You may consider the opportunity or lack of opportunity of the witness observing or knowing concerning the things about which he has testified and the reasonableness of the testimony considered in the light of all the evidence in the case.

FINAL INSTRUCTION NO. 23

If there are conflicts in the evidence, it is your duty to reconcile the conflicts, if you can, on the theory that each witness has testified to the truth. If you cannot so reconcile the testimony, then it is within your province to determing whom you will believe and whom you will disbelieve. (You should weigh the evidence and give credit to the testimony in light of your own experience and observations in the ordinary affairs of life.)

FINAL INSTRUCTION NO. 24

The credibility of a witness may be attacked by introducing evidence that

on some former occasion the witness made a statement, made a written statement, in former testimony testified, or acted in a manner inconsistent with his testimony in this case. Evidence of this kind may be considered by you in connection with all the other facts and circumstances in evidence in deciding the weight to be given to the testimony of that witness.

FINAL INSTRUCTION NO. 25

The Court has permitted expert opinion testimony in this case for consideration of the jury. The opinions of such witnesses are not admitted for the purpose of controlling the judgment of the jury, but are to be considered for what they are worth in the jury's opinion when considered with other evidence in this case. If you think from all of the evidence in the case that you ought to reject the testimony of such witnesses or any of them, you have a right to do so.

Thus, if you should decide that an opinion of an expert is not based upon sufficient education or experience, or if you should conclude that the reasons given to support the opinion are not sound, or outweighed by other evidence, you may disregard the opinion entirely.

Also, if you find that an expert witness has based an opinion in whole or in part upon an assumed fact which is not proved by a preponderance of the

evidence, you should disregard that opinion of the witness.

Lastly, since the law gives no weight to testimony based upon guess, speculation, or surmise and, to the extent that you find that any expert has based his opinion on such matters, you should give no weight or credit to such testimony and your verdict may not be based thereon.

FINAL INSTRUCTION NO. 26

During the progress of the trial, certain questions have been asked of witnesses and certain exhibits have been offered which the Court has ruled are not admissible into evidence. You must not concern yourselves with the reasons for the rulings since the production of evidence is strictly controlled by rules of law.

You are not to consider exhibits or testimony which were not admitted into evidence nor are you to consider testimony to which an objection was sustained.

FINAL INSTRUCTION NO. 27

In deciding this case, you must determine the facts from a consideration of all the evidence in light of the law as contained in these instructions. All the law in this case is not embodied in any single instruction. Therefore, you must

consider these instructions as a whole and construe them in harmony with each other.

FINAL INSTRUCTION NO. 28

I instruct you that sympathy or prejudice should have no influence upon you nor control your verdict in any way. The question of whether the defendant is liable is to be determined from the evidence, under the instructions of the Court. Prejudice, sympathy or any outside consideration should not in any way affect your determination of any question in the case.

FINAL INSTRUCTION NO. 29

I instruct you that in deliberating upon your verdict, each juror should exercise his individual judgment, so that when a verdict is agreed upon it will constitute the verdict of each individual juror.

In arriving at a verdict, each juror should give due consideration to the views and opinions of the other jurors and should listen to their arguments with a willingness to be convinced and to yield to their views if induced to believe them to be correct. But no juror should agree upon a verdict unless he is convinced that it is correct and unless it is a verdict which his conscience approves, and which such juror under his oath, after full consideration, believes to be right.

FINAL INSTRUCTION NO. 30

In the event that you find that any plaintiffs are entitled to recover, you will assess the damages of each separately and return a verdict in a separate amount for each.

FINAL INSTRUCTION NO. 31

If you find for the plaintiff, Gerald Rubush, on the question of liability, you then must determine the amount of money which will fairly compensate Gerald Rubush for those elements of damage which were proved by the evidence to have been proximately caused by the machine involved in this case. You may consider:

a. The nature and extent of the injuries;

b. Whether the injuries are temporary or permanent;

c. The physical pain and mental suffering experienced and reasonably certain to be experienced in the future as a result of the injuries;

d. The value of lost time, earnings, and loss or impairment of earning capacity and the cost of necessary medication;

e. Disfigurement and deformity resulting from the injuries; and;

f. The age, employment and the opportunities for employment and the normal life expectancy of plaintiff.

You are to determine whether these elements of damage have been proved by a consideration of evidence relating to damages. Your verdict must be based on that evidence and not on guess or speculation. You are instructed that the plaintiff is not required to introduce evidence of the monetary value of pain and suffering.

If you find for the plaintiff Phyllis Rubush, on the question of liability, you then must determine the amount of money which will fairly compensate Phyllis Rubush for those elements of damage which were proved by the evidence to have been proximately caused by the machine involved in this case. You may consider:

A. The reasonable value of the loss of services, society and companionship of Gerald Rubush from the date of the accident to the date that the plaintiffs were divorced; and

B. The reasonable value of the loss of the services, society and companionship of Gerald Rubush from the date that

the plaintiffs were divorced to the present time if you find that the divorce was a proximate result of the injuries suffered by Gerald Rubush in the accident; and

C. The present cash value of the services, society and companionship of Gerald Rubush which is reasonably certain to be lost in the future if you find that the divorce was a proximate result of the injuries suffered by Gerald Rubush in the accident.

D. As previously instructed, you may consider the fact of the divorce of the plaintiffs and the evidence of Phyllis Rubushs intended remarriage in mitigation of her damages.

You are to determine whether these elements of damage have been proved by a consideration of evidence relating to damages. Your verdict must be based on that evidence and not on guess or speculation.

FINAL INSTRUCTION NO. 32

If you find for the plaintiffs, Gerald G. Rubush and Phyllis C. Rubush, and against the defendants Bemis Company, Inc., and Wabash Products Division of Bemis Company, Inc., the form of your verdict may be:

"We the Jury, find for the plaintiffs, Gerald G. Rubush and Phyllis C. Rubush, and against the defendants, Bemis Company, Inc., and Wabash Products Division of Bemis Company, Inc., and assess plaintiff Gerald G. Rubush's damages at _____ Dollars ($_____), and assess plaintiff Phyllis C. Rubush's damages at _____ Dollars, ($_____)."

If you find for the defendants and against the plaintiffs, the form of your verdict may be: "We, the jury, find for the defendants."

Forms of verdicts will be furnished to you.

FINAL INSTRUCTION NO. 33

In order to assist you in arriving at your verdict, these instructions will be sent with you to your jury room when you retire to deliberate upon your verdict.

FINAL INSTRUCTION NO. 34

Upon retiring to the jury room, you will select one of your members to act as Foreman. The Foreman will preside over your deliberations and must sign and date the verdict to which you agree.

As soon as you have arrived at your verdict, notify the Bailiff.

The Bailiff will then return you to the Jury Box.

Dated at Greenfield, Indiana this 25th day of February, 1977.

Wesley W. Ratliff, Jr.
Special Judge

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION
FOURTEENTH AMENDMENT § 1

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF STATE OF INDIANA
ARTICLE 1, SECTION 20

"Section 20. In all civil cases, the right of trial by jury shall remain inviolate."

INDIANA RULES OF APPELLATE PROCEDURE

APPELLATE RULE 1

Scope of the Rules

"These rules shall govern the practice and procedure in appeals to the Supreme Court and the Court of Appeals. Wherever in any rules of this Court the 'Appellate Court' is referred to there shall be substituted therefor the words 'Court of Appeals' and such rules shall be applicable to the Court of Appeals on and after January 1, 1972."

"Amended Jan. 1, 1972."

APPELLATE RULE 15

Opinions, Memorandum Decisions, Powers and Conduct of Court on Appeal; Miscellaneous Provisions

..."(N) Order or Relief Granted on Appeal. An order or judgment upon appeal may be reversed as to some or all of the

parties and in whole or in part. The court, with respect to all or some of the parties or upon all or some of the issues, may order:

(1) A new trial;

(2) Entry of final judgment;

(3) Correction of a judgment subject to correction, alteration, amendment or modification;

(4) In the case of claims tried without a jury or with an advisory jury, order the findings or judgment amended or corrected as provided in Rule 52(B);

(5) In the case of excessive or inadequate damages, entry of final judgment on the evidence for the amount of the proper damages, a new trial, or a new trial subject to additur of remittitur; or

(6) Grant any other appropriate relief, and make relief subject to

conditions.

The Court shall direct final judgment to be entered or shall order the error corrected without a new trial unless such relief is shown to be impracticable or unfiar to any of the parties or is otherwise improper; and if a new trial is required it shall be limited only to those parties and issues affected by the error unless such relief is shown to be impracticable or unfair. A judgment may be affirmed on conditions. A verdict, finding, judgment, order or decision shall be reversed upon appeal as not supported by or as contrary to the evidence only when clearly erroneous, and due regard shall be given to the opportunity of the finder of fact to judge the credibility of witnesses."

INDIANA RULES OF TRIAL PROCEDURE

TRIAL RULE 1

Scope of the Rules

"Except as otherwise provided, these rules govern the procedure and practice in all courts of the state of Indiana in all suits of a civil nature whether cognizable as cases at law, in equity, or of statutory origin. They shall be construed to secure the just, speedy and inexpensive determination of every action."

TRIAL RULE 50

Judgment on the Evidence (Directed Verdict)

"(A) Judgment on the evidence-- How raised--Effect. Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evi-

dence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict. A party may move for such judgment on the evidence:

"(1) after another party carrying the burden of proof or of going forward with the evidence upon any one or more issues has completed presentation of his evidence thereon; or

"(2) after all the parties have completed presentation of the evidence upon any one or more issues; or

"(3) after all the evidence in the case has been presented and before judgment; or

"(4) in a motion to correct errors; or

"(5) may raise the issue upon appeal for the first time in criminal appeals but not in civil cases; or

"(6) the trial court upon its own motion may enter such a judgment on the evidence at any time before a motion to correct error is required to be made, or, if made, at any time before entering its order or ruling thereon. A party who moves for judgment on the evidence at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a judgment on the evidence which is not granted or which is granted only as to a part of the issues is not a waiver of trial by jury even though all parties to the action have moved for judgment on the evidence. A

motion for judgment on the evidence made at one stage of the proceedings is not a waiver of the right of the court or of any party to make such motion on the same or different issues or reasons at a later stage as permitted above, except that error of the court in denying the motion shall be deemed corrected by evidence thereafter offered or admitted.

"(B) Jury trial subject to entry of judgment on the evidence. Every case tried by a jury is made subject to the right of the court, before or after the jury is discharged, to enter final judgment on the evidence, without directing a verdict thereon.

"(C) New trial in lieu of judgment on the evidence. When a judgment on the evidence is sought before or after the jury is discharged, the court may grant a new trial as to part of all of the

issues in lieu of a judgment on the evidence when entry of a judgment is impracticable or unfair to any of the parties or otherwise is improper, whether requested or not.

"(D) Reasons for judgment on the evidence--Partial relief. A motion or request for judgment on the evidence shall state the reasons therefor, but it need not be accompanied by a peremptory instruction or prayer for particular relief. In appropriate cases the court, in whole or in part, may grant to some or all of the parties a judgment on the evidence or new trial in lieu thereof. Unless otherwise specified a motion or request for a judgment on the evidence is general, but the court shall grant such judgment or relief only as is proper.

"(E) Motion for judgment notwithstanding verdict, motion in arrest of

judgment, demurrer to the evidence and venire de novo abolished. The motion for judgment notwithstanding verdict, motion in arrest of judgment, demurrer to the evidence, and venire de novo are abolished."

THE AMERICAN LAW INSTITUTE
RESTATEMENT OF THE LAW
SECOND
TORTS 2D

"§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

"(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not brought the product from or entered into any contractual relation with the seller."

Opposition

Office - Supreme Court, U.S.
FILED
JUL 7 1982
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CLERK

No. 81-2072

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GERALD G. RUBUSH and PHYLLIS C. RUBUSH,

Petitioners,

vs.

BEMIS COMPANY, INC., and WABASH PRODUCTS, DIVISION OF BEMIS COMPANY, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Indiana

RESPONDENTS' BRIEF IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1981

GERALD G. RUBUSH and PHYLLIS C. RUBUSH,

Petitioners,

vs.

BEMIS COMPANY, INC., and WABASH PRODUCTS, DIVISION OF BEMIS COMPANY, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Indiana

RESPONDENTS' BRIEF IN OPPOSITION

I.

STATEMENT OF THE CASE

A. COURSE OF THE PROCEEDINGS

The statement of the course of proceedings by Petitioners Gerald D. Rubush and Phyllis C. Rubush (hereinafter "Rubush") is notable for a continuing omission. Rubush failed to mention that defendants-respondents Bemis Company, Inc. and Wabash Products Division of Bemis Company, Inc. ("Bemis") sought entry of judgment as a matter of law on their behalf from the outset

of this case, and through each stage of this judicial proceeding. At trial, Bemis asserted its right to an entry of judgment on its behalf by a Motion for Judgment on the Evidence[1] and in its post-trial Motion to Correct Errors.[2] On appeal, this issue was specifically presented and argued to the Indiana Court of Appeals.[3] This was specifically recognized and responded to by the Indiana Court of Appeals in its opinion (Appendix at A-67, A87-89). Finally, Bemis' contention was again set forth in its Petition to Transfer to the Indiana Supreme Court, where it was ultimately resolved in Bemis' favor.[4]

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[1] Pursuant to Ind. R. Tr. P. 50.

[2] Ind. R. Tr. P. 59 and Ind. R. Ap. P. 8.3(A)(7) require that each specific error to be asserted on appeal *must* be included in a Motion to Correct Errors filed with the trial court within 60 days of the final judgment. All errors not contained therein are waived. Asserted Errors 44 and 45 in Bemis' Motion to Correct Errors claimed the jury's verdict was not supported by sufficient evidence and was contrary to law. Included in the prayer for relief in that post-trial motion was a request that "the Court *enter such Order correcting errors set forth, granting defendants a new trial, judgment for the defendants. . . .*" (Motion to Correct Errors at 40.)

[3] The Conclusion section of Bemis' Appellants' Brief, as per Ind. R. Ap. P. 8.3(A)(8), requested as relief that "the judgment of the trial court must not only be reversed but this Court should direct entry of judgment for Bemis without the necessity of a new trial." (Appellants' Brief at 251.) Moreover, Bemis' Appellants' Brief to the Indiana Court of Appeals included a 32 page section designated: "ERROR IN THAT VERDICT IS NOT SUPPORTED BY SUFFICIENT EVIDENCE OR IS CONTRARY TO THE EVIDENCE OR IS CONTRARY TO LAW." (*Id.* at 205-37.)

[4] Bemis' Petition to Transfer again requested as relief that the Indiana Supreme Court "enter judgment as a matter of law for the defendant-appellants [Bemis]." (Petition to Transfer at 26.) In Bemis' supporting brief, an entire section was devoted specifically to Bemis' argument that it was entitled to judgment as a matter of law. This section was entitled "THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JUDGMENT AND REQUIRED ENTRY OF JUDGMENT FOR BEMIS," Brief in Support of Petition For Transfer at 64-69.

Rubush apparently omits any reference to Bemis' persistent arguments that it was entitled to judgment as a matter of law (at each stage of these proceedings), so as to enable him to make the ostensible claim that the purported constitutional ramifications of entry of such judgment by the Indiana Supreme Court for Bemis was "unexpected," and one which could not have been anticipated. However, it cannot be seriously contended that granting of the relief prayed for by Bemis at trial, on appeal to the Indiana Court of Appeals, and on transfer to the Indiana Supreme Court, could not reasonably have been anticipated by counsel for Rubush.

B. STATEMENT OF FACTS

Rubush's statement of facts is not accurate. In order to support plaintiffs' argument that the Indiana Supreme Court misconstrued the evidence and Rubush's legal theory, Rubush has both misstated the content of testimony, and attempted to state as facts legal positions as to Indiana products liability law which were specifically rejected by the Indiana Supreme Court.

Being aware of the Court's desire for brevity, and the fact that this Court should not, except in the most exceptional circumstances, be requested to review evidentiary matters, Bemis will not presume to address in this brief each and every misstatement in Rubush's Petition. Rather, for the Court's convenience, Bemis has included in the Supplemental Appendix filed with this Court a copy of the Brief filed by Bemis in the Indiana Supreme Court in opposition to Rubush's unsuccessful Petition for Rehearing before that Court. If this Court is so inclined, a cursory review of Bemis' Brief in the Supplemental Appendix reflects that Bemis has already responded to the very same arguments being asserted here by Rubush; the only difference being that those

same arguments are now draped by Rubush with a constitutional cloak. Other than that there is nothing that Rubush presents to this Court which was not already considered and rejected by the Indiana Supreme Court in its denial of rehearing to Rubush. Bemis' Brief in Opposition also contains extensive quotations to the trial testimony demonstrating to the Indiana Supreme Court that its opinion correctly stated the facts, contrary to Rubush's assertion in that court (and now in this Court) that the Indiana Supreme Court misconstrued the Record and Rubush's theory at trial. Those citations to the Record establish that the uncontroverted testimony of each witness, including each of the lay and expert witnesses called by the plaintiffs, was that the pertinent dangers associated with the Batt Packer were open and obvious to any operator; and, therefore, under the Restatement of Torts (2d), § 402A, not "unreasonably dangerous"; and the Indiana Supreme Court properly so concluded and, therefore, entered judgment in favor of Bemis.

The simple fact is that Rubush's "construction" of the Record advanced to the Indiana Supreme Court in Rubush's Petition and Brief for Rehearing and rejected by that court, and now duplicated in its Statement of Facts before this Court, incorrectly transposes the supposed dangers arising out of the operation of the Batt Packer to a time and place which were not germane to the actual operation of a person operating the Batt Packer. Simply put, as Bemis pointed out to the Indiana Supreme Court in its Brief in Opposition to Rubush's Petition for Rehearing:

> In short, every single piece of evidence that plaintiffs set forth in their Brief for Rehearing in a desperate attempt to create a factual issue as to the open and obvious danger is evidence that does not

> address itself to the causative dangers in this lawsuit, whereas the testimony quoted above, and the majority's recitation of facts does just that. There is absolutely no conflict between the testimony cited by plaintiffs in their Brief and the testimony of the same witnesses cited above. Plaintiffs' interpretation of the Record, however misleading, transposes certain dangers to a function of the bagger that is actually not being performed at the time the supposed danger exists.
>
> Supplemental Appendix at 19a.

As a review of the opinion of the Indiana Supreme Court and quoted testimony contained in Bemis' Brief in the Supplemental Appendix reflects, the Indiana Supreme Court correctly chose not to subscribe to Rubush's misleading interpretation of the Record. Rather, the Indiana Supreme Court correctly directed its attention to the testimony relating to the dangers that were appropriate to the time and place involved and rightfully concluded that the causative dangers were uncontrovertedly open and obvious and, therefore, by definition, not unreasonably dangerous under the Restatement of Torts 2nd, Section 402A.

II.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

Petitioners have asserted no "special or important reasons"[5] for this Court to grant certiorari, and therefore this Petition for Writ of Certiorari should be denied.

This case involves solely the interpretation and determination of state law of products liability, and the determination by the highest court of the state of Indiana that under that rule of law plaintiff-petitioner Rubush, as a matter of law, is not entitled to recover for his injuries from defendant Bemis.

As the opinion of the Indiana Supreme Court amply demonstrates, that court concluded that Indiana (unlike some other jurisdictions) should remain a Restatement of Torts 2d, § 402 state in respect to the theory of Strict Product Liability. This was based upon the language of the Restatement, including the definition of the essential element that the product in question must be "unreasonably dangerous"; that is, dangerous to an extent not contemplated by the ordinary consumer (Appendix at A-13). In doing so, as the decision reflects, the Indiana Supreme Court relied upon the Comments in the Restatement and pre-existing Indiana case law. Moreover, as pointed out in previous briefs filed by Bemis, there are a number of other states which have done so and have also concluded that the "Open and Obvious Rule" is an integral part of the Restatement § 402 definition of "unreasonably dangerous." *See, e.g., Berry v. Eckhardt Porsche Audi, Inc.*, 578 P.2d 1195 (Okla. 1978); *Vincer v.*

[5] Sup. Ct. Rule 17.1.

Esther Williams All-Aluminum Swimming Pool Co., 69 Wis.2d 326, 230 N.W.2d 794 (1975); *Stokes v. Peyton's Inc.*, 526 F.2d 372 (5th Cir. 1976) (applying Georgia law). Conversely, it is apparent that the Indiana Supreme Court decided not to follow the courts in some other jurisdictions which have either admittedly or unwittingly departed from the Strict Liability doctrine set forth in the Restatement § 402A by rejecting the Open and Obvious Rule. *See, e.g., Pike v. Frank G. Hough Co.*, 2 Cal.3d 465, 85 Cal. Rptr. 629, 467 P.2d 229 (1970) (non-402A jurisdiction); *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 290 A.2d 281 (1972) (non-402A jurisdiction); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571 (1976) (non-402A jurisdiction in that contributory negligence is a defense to strict liability); *Bryns v. Riddell, Inc.*, 113 Ariz. 264, 550 P.2d 1065 (1976) (402A jurisdiction relying upon *Micallef* decision in non-402A state); *Pust v. Union Supply Co.*, 38 Colo. App. 435, 561 P.2d 355 (1976) (402A jurisdiction relying upon *Micallef* decision in non-402A state).

Once having decided that Indiana would remain a Restatement § 402A state, and that prior Indiana case law recognized the integral role that the Open and Obvious Rule played under the Restatement definition of the term "unreasonably dangerous product," the Indiana Supreme Court did the only thing possible. It decided that on the record before it, Bemis was entitled to judgment as a matter of law because the operative dangers associated with the functions of the Batt Packer were uncontrovertedly open and obvious and, therefore, not "unreasonably dangerous."

Simply put, that was all that was involved in this case. This Court has never seen fit to review similar decisions made by other jurisdictions whichever way they came down on the issue, and it is respectfully submitted that it should not do so now.

Finally, not only does Rubush's Petition lack merit, but, as discussed immediately below, the issues asserted in the Petition were not properly raised and are not timely or properly before this Court.

A. FEDERAL QUESTION NOT TIMELY RAISED.

Petitioners' assertion of a federal question in this matter came far too late to present an issue to this Court, and consequently this Petition should be denied.

The general rule is that this Court will not consider matters raised for the first time in a Petition for Rehearing to a state supreme court. Such may only be done if the state supreme court decision gave a new basis for a constitutional claim *which reasonably could not have been anticipated*, and therefore could not have been earlier raised. *Great Northern Ry. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932); *Missouri v. Gehner*, 281 U.S. 313 (1930).

Rubush admits that its attempted constitutional allegation was first raised in its Petition for Rehearing to the opinion of the Indiana Supreme Court.[6] Nevertheless, Rubush asserts that he falls within the exception; that is, the Indiana Supreme Court's decision could not have been anticipated, and therefore his new constitutional issue could be asserted before this Court. Not so.

Bemis has contended at each stage of the proceedings below that it was entitled to judgment as a matter of law. (*See* discussion, pp. 1-2, *supra.*) Despite Bemis' repeated requests for this specific relief, which was granted by the Indiana Supreme Court, Rubush failed at any point in any of the prior proceedings to argue

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[6] Rubush Petition at 7-9.

that granting this relief would deprive Rubush of a constitutional right. It is no excuse to Rubush that he never thought the relief would be granted and therefore never argued the purported constitutional ramifications of granting Bemis' requested relief. Rubush passed up numerous opportunities to present this asserted constitutional issue to the Indiana courts as an additional basis for rejecting the requested relief, but Rubush failed to do so until the Petition for Rehearing to the Indiana Supreme Court. This was too late. Accordingly, this Petition should be denied.

B. FAILURE TO PROPERLY RAISE ISSUE OF CONSTITUTIONALITY.

Even if timely, Rubush's supposed federal question was not sufficiently and adequately raised to present the issue to the state court. Consequently, no federal question is before this Court.[7]

For this Court to consider a constitutional issue in a Petition for Certiorari, the issue must first have been brought to the attention of the state court with "fair precision and in due time." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). No particular form of words or phrases is needed. *Id.*; *Street v. New York*, 394 U.S. 576 (1969).

It is unclear the extent to which this Court is bound by Indiana's procedural rules in determining whether a

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[7] Rubush in his petition asserts a deprivation of jury trial rights under Indiana Constitution Article 1, Section 20. (Rubush Petition at 31, 41). This issue has not been previously raised, and therefore it is not before this Court. *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932). Moreover, the Indiana Supreme Court is the final determinator of rights under the Indiana Constitution. *See North Carolina v. Butler*, 441 U.S. 369 (1979).

constitutional issue was properly raised. *See Street v. New York*, 394 U.S. at 583. *But see Barbour v. Georgia*, 249 U.S. 454 (1919) (issue not raised according to state procedural rule is waived on Petition for Certiorari). In any event, Rubush did not raise his asserted constitutional issue pursuant to Indiana Rule of Appellate Procedure 11, nor with the specificity and precision required by this Court. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74. Nor was this issue necessarily addressed by the Indiana Supreme Court, *Street v. New York*, 394 U.S. 576; *Bailey v. Anderson*, 326 U.S. 203 (1945), as it summarily denied Rubush's Petition for Rehearing. *Citizens National Bank v. Durr*, 257 U.S. 99 (1921).

As previously discussed, Rubush's sole reference to a constitutional question was in his Petition for Rehearing to the Indiana Supreme Court. In its totality, that argument was:

> 4. By summarily and arbitrarily depriving Phyllis and Gary Rubush of an opportunity to litigate their vested cause of action, the decision of this Court violates fundamental principles of due process and equal protection.
>
> *Boddie v. Connecticut* (1971) 401 U.S. 371. *Cf. Dague v. Piper Aircraft Corp.* (1981) ..... Ind. ....., 418 N.E. 2d 207.

Rubush Petition for Rehearing (Appendix at A-124).

This entire "argument" is nothing more than a bald assertion of deprivation of due process and equal protection. Two cases are cited without discussion, neither of which on its face appears to have any relevancy.[8] This

[8] *Boddie v. Connecticut*, 401 U.S. 371 (1971), held that marriage is of fundamental importance to our modern society and that denying indigents access to the courts for divorce pro-

(Footnote continued on following page)

most assuredly does not present a constitutional issue "with fair precision". *Pruneyard Shopping Center v. Robins* 447 U.S. 74. The absence of proper argument is made even more apparent by Rubush's total failure in his 85 page Brief in Support of Rehearing to the Indiana Supreme Court to make even a single reference to "due process," "equal protection" or any provision of the United States Constitution. Indiana Rule of Appellate Procedure 11 requires that a rehearing petition "stat[e] concisely the reasons why the decision is thought to be erroneous," and "may, if desired, be supported by briefs." Indiana courts have repeatedly held that assertions of error not accompanied by argument are waived. *Speiser v. Addis*, 411 N.E.2d 439 (Ind. App. 1980). *See Dorweiler v. Sinks*, 238 Ind. 368, 151 N.E.2d 142 (1958). Failure to set forth the factual foundation needed for application of cited cases to the case at bar also results in waiver. *Van Bibber v. Norris*, 408 N.E.2d 1302 (Ind. App. 1980) (Opinion on Rehearing). *See, also, Glover v. Ottinger*, 400 N.E.2d 1212 (Ind. App. 1980) (three sentence argument supported by a single citation was not sufficient to raise an issue on rehearing).

Rubush's asserted federal constitutional issue was not adequately raised.

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[8] *continued*
ceedings due to their inability to pay filing fees was a denial of due process. *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981) is an Indiana Supreme Court Opinion upon a certified question from the United States District Court for the Northern District of Indiana as to the interpretation of Indiana's product liability statute, Ind. Code 33-1-1.5-1 *et seq.* The Indiana Supreme Court interpreted the statute and upheld its validity under the Indiana Constitution.

C. ISSUE NOT PROPER FOR GRANT OF CERTIORARI.

Even if the asserted constitutional issue was properly and timely raised, this case is not appropriate for a grant of certiorari. Rubush is attempting to have this Court review the determination of the Indiana Supreme Court as to what Indiana's law of products liability is, and whether the evidence in this case was sufficient to avoid a directed judgment which was ordered by the Indiana Supreme Court.[9] Such is not the function of this Court. Rubush has not shown any special or important reason for granting certiorari.[10] His petition is merely a strained attempt to insert a federal question into that which is entirely a matter of state law of interest only to product liability litigants in Indiana so far as the law is concerned, and to the litigants in this particular case insofar as the sufficiency of Rubush's evidence to avoid a directed verdict on a claim under that state's products liability law. Such is not the type of case for which a grant of certiorari is appropriate.

Rubush's Petition implores this Court to undertake an independent review of the extensive record in this products liability case decided under Indiana law.[11] While

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[9] Rubush makes the unique mathematical argument that he was somehow deprived of some legal rights because five of eight Indiana Appellate Judges voted to affirm his judgment, lumping together the votes of both the Indiana Court of Appeals and the dissenters in Indiana Supreme Court. Such an argument passes the bounds of all reasonableness. The Indiana Supreme Court's decision, even though by a 3-2 decision, is no less proper and determinative of the case than a unanimous decision.

[10] Sup. Ct. Rule 17.1.

[11] Rubush cites a number of cases, none of which are applicable to this situation. Independent examination of the record is undertaken only where significant infringement upon fun-

(Footnote continued on following page)

this Court does have the power to make an independent examination of the record, it is only done in "exceptional circumstances." *See California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980); *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157 (1952). No exceptional circumstances are present here. This Court gives great weight to the decision of a state's highest court on matters of state law, and customarily accepts the state court's findings absent some exceptional circumstance. *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97. Moreover, the determination of state law is a matter specifically for the Indiana Supreme Court, and is binding upon this Court. *Neblett v. Carpenter*, 305 U.S. 297 (1938); *West v. Louisiana*, 194 U.S. 248 (1904); *Castillo v. McConnico*, 168 U.S. 674 (1898).

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[11] *continued*

damental rights guaranteed by the Constitution was involved, such as state supported schemes of racial discrimination [*Norris v. Alabama*, 294 U.S. 587 (1935)], coerced confessions from criminal defendants [*Ashcraft v. Tennessee*, 322 U.S. 143 (1944)], issues of expressions of free speech [*New York Times v. Sullivan*, 376 U.S. 254 (1964)], and attempts to impose state taxes on the United States government, [*Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954)]. The present case is purely one of the sufficiency of evidence under Indiana's state law of products liability. Nothing more. It does not come within the scope of those cases where this Court has undertaken the cumbersome task of independently reviewing the record of the case.

Rubush also cites a number of cases decided under the Federal Employers Liability Act (FELA) in which this Court has independently reviewed the record to determine whether there was sufficient evidence to present the matter to the jury. *See* Rubush Petition at 38. As this Court is aware, the FELA cases presented a special situation. In *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), Justice Douglas in his concurring opinion explained that granting certiorari in the FELA cases was necessary to prevent frustration of the Congressional policy that juries determine liability in such cases. *Id.* at 69. Again, the special circumstances presented by the FELA cases are not applicable here.

This Court's function is not to review determinations by lower appellate courts as to the sufficiency of evidence to take a case under state law to the jury. This was eloquently addressed by Justice Frankfurter in his dissent to granting certiorari in *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 447 (1959).[12] He stated:

> Alike in Congress and here it has been repeatedly insisted that a question like that raised by petitioner—was there sufficient evidence for submission to a jury—is not proper for review in this Court. . . .
>
> To bring a case here when there is no "special and important" reason for doing so, when there is no reason other than the interest of a particular litigant, especially when the decision turns solely on a view of conflicting evidence or the application of a particular local doctrine decided one way rather than another by a Court of Appeals better versed in the field of such local law than we can possibly be, works inroads on the time available for due study and reflection of those classes of cases for the adjudication of which this Court exists.
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> *Id.* at 457.

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[12] *Dick v. New York Life Ins. Co.* was a diversity case involving recovery under two life insurance policies. New York Life defended on the grounds of a suicide exclusion in the policies. The matter was tried in the United States District Court for North Dakota under North Dakota law. Upon jury verdict, judgment was entered for the plaintiff, but the Eighth Circuit Court of Appeals reversed on the grounds that there was not sufficient evidence to present the matter to the jury. The United States Supreme Court, in an opinion expressing the views of five justices, reversed on the grounds the Court of Appeals had failed to follow North Dakota law and give effect to the presumption under state law that deaths are accidental and not suicidal. The present case does not involve a federal court's interpretation of Indiana law. Rather, it is a determination of Indiana law by the highest court of that state. Respondents have not found a single case in this Court's 192 year history which supports granting certiorari to instruct a state supreme court that it incorrectly decided its own state law.

Justice Frankfurter's words ring even more true after two decades of increasing court case loads. The history of the past decade shows this Court has heeded his wise comments.

Additionally, Justice Frankfurter addressed the specific argument forwarded here—that is, that an entry of judgment on the evidence involves an issue of jury trial deprivation for this Court to review. He stated:

> What are the questions which petitioner here presses upon us? The petition for certiorari sets forth as the questions presented: (1) was petitioner deprived of her constitutional right to a jury trial guaranteed by the Seventh Amendment? (2) did the Court of Appeals refuse to follow North Dakota law? *If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict,* every judgment notwithstanding the verdict. *Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues,* nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence.

Id. at 456 (emphasis added).

In any event, Rubush was not denied his right to jury trial.[13] The authority he cites is not applicable, as those

[13] This Court has specifically held that a right to jury trial is not infringed by an appellate court entering judgment notwithstanding the verdict in reversing a case. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967). To hold otherwise, as Justice Frankfurter observed, would create a federal question

(Footnote continued on following page)

cases involved procedural determinations which deprived parties of ever placing their case before a jury. *See* Rubush Petition at 25. Here, Rubush presented all of his evidence to the court and the jury. The ruling of the Indiana Supreme Court was simply that the case was not submitted to the jury in accordance with Indiana law and that under Indiana law, the evidence presented could not support liability against defendant Bemis as a matter of law. The Indiana Supreme Court, consistent with prior cases under Indiana law, other § 402A jurisdictions, and the language of the Restatement of Torts 2d, § 402A, held that where a danger is open and obvious (as that term is defined under Indiana law), an injured person cannot impose liability for that danger upon the defendant. Surely a determination by a state's highest court that under its rule of law, the uncontroverted evidence adduced at trial presented no jury issue does not amount to a constitutional issue reviewable by this Court; and that is the import of Justice Frankfurter's opinion in *Dick*.

Little need be said to refute Rubush's disingenuous argument that the jury in this case could have found, under the instructions given, that the dangers associated with the batt packer were not open and obvious, and therefore unreasonably dangerous which, according to Rubush, made the Indiana Supreme Court's entry of judgment for Bemis a circumvention of "any fair interpretation of this Jury's verdict." (Rubush Petition at 57.) This argument is utter nonsense for the simple reason

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[13] *continued*
as to every motion to dismiss and directed verdict. Indeed, directed verdicts are perhaps the most effective tool possessed by courts in disposing of cases where there has been insufficient evidence, thereby insuring that cases are determined on the basis of the law of that jurisdiction.

that it is premised on the misleading assumption that the trial court's instructions were correct.

Specifically, the Indiana Supreme Court concluded that the trial court's instructions on the role of the Open and Obvious Rule under the Restatement were clearly erroneous, and that Bemis' requested instructions 4 and 5 on that issue should have been given. Moreover, the Supreme Court also found that the trial court's refusal to give *any* instruction defining the term "unreasonably dangerous" under the Restatement was also clear error and that the trial court should have given Bemis' requested instruction number 3 on that point. The requested instructions which the Indiana Supreme Court said should have been given are included in the Supplemental Appendix (at 1a-2a) and are referred to in The Indiana Supreme Court's Opinion (Appendix at A18, 19) if the Court should choose to examine them. Whether or not the Court does, the salient point is that the Indiana Supreme Court said that these instructions should have been given; and if it had been, no reasonable jury could have found against Bemis. In other words, Rubush's argument that the jury could have found the Batt Packer to contain latent defects under incorrect jury instructions *negating* the necessity of so finding in order to hold Bemis liable borders on the fatuous—if only because that is exactly what the jury found under instructions which the Indiana Supreme Court said were not the law in Indiana.

Finally, Rubush, as an apparent afterthought, has included an attempted equal protection argument based upon denying equal protection between those injured on guarded machines and those injured on unguarded machines. (Rubush Petition at 59-61). This argument was not raised prior to this Petition, and therefore has been

waived. *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932). The argument itself is without citation, totally spurious, and not deserving of substantive response by Bemis, except to note that the Indiana Supreme Court made it clear that the law requires that the nature of the danger be analyzed in the same way whether or not a machine is guarded or not guarded; that is, the inquiry is whether the danger associated with the operation of the machine was open and obvious, and therefore by definition *not* beyond the expectations of the ordinary consumer (Restatement Torts 2d, § 402; Comments).

III.

CONCLUSION

Rubush's Petition for Writ of Certiorari does not present any substantial federal question for this Court's review. The asserted federal question was not timely or properly raised in the state court proceedings, and cannot now be presented to this Court. Moreover, this case involves only the interpretation of Indiana's products liability law, and the application of that law to the facts of this particular case. There are no special or important reasons for this Court to grant review of the Indiana Court's decision. The Petition For Writ of Certiorari to the Indiana Supreme Court should be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX A

BEMIS TENDERED INSTRUCTIONS

The Instructions below were tendered at trial by Bemis and refused by the trial court. The Indiana Supreme Court held that the failure to give these instructions was reversible error. (Appendix at A-18, 19)

INSTRUCTION NO. 3

"The plaintiffs, in order to prevail here, must establish by a preponderance of the evidence *each* of the following:

> *First*, that at the time the batt packer in question was supplied by the defendants it was in a defective and unreasonably dangerous condition not contemplated by the ultimate consumer such that it was dangerous to an extent beyond that which would have been contemplated by the ordinary consumer who purchased or used it with like age, judgment, experience, and knowledge as that which was possessed by the plaintiff at the time of his injury.
>
> *Second*, that the batt packer was expected to and did reach the ultimate consumer without substantial change in its condition;
>
> *Third*, that plaintiffs' injuries were a direct and proximate result of the defective and unreasonably dangerous condition.

If you find that the plaintiffs have established each of these elements, your verdict should be for the plaintiffs, unless you find for the defendant on its affirmative defenses. On the other hand, if you do not find the plaintiffs proved each of these elements by a preponderance of the evidence, then you should find for the defendant, without regard to whether defendant has proved its affirmative defenses."

INSTRUCTION NO. 4

"There must be reasonable freedom and protection for manufacturers such as the defendant. The defendant was not obliged to design and manufacture the Batt Packer so that it was accident proof or impossible for plaintiff to injure himself while using it. Defendant's duty is merely to supply a machine which is reasonably safe for its intended use; that is, one which does not contain hidden or concealed dangers which would not have been readily apparent to customers or users; and that duty is satisfied when such employer knows of the dangers or when the danger would have been readily apparent to plaintiff's employer."

INSTRUCTION NO. 5

"The defendant has no legal duty to provide the Batt Packer in question with safety guards or warnings against dangers or the potentiality of dangers which plaintiff knew or should have known, or which were generally known and recognized by the users of the product because they were obvious; nor were the defendants required to foresee or protect the plaintiff from his own carelessness."

SUPPLEMENTAL APPENDIX B

IN THE SUPREME COURT OF INDIANA
No. 1181 S 319
(On Transfer From The
Court Of Appeals Of Indiana)

BEMIS COMPANY, INC., and Wabash Products, Division Company, Inc.,

Defendants-Appellants,

v.

GERALD G. RUBUSH and PHYLLIS C. RUBUSH,

Plaintiffs-Appellees.

Court of Appeals of Bemis No. 1-877A164
Appeal from the Hancock Circuit Court
The Honorable Wesley W. Ratliff, Jr., *Special Judge*

APPELLANTS' BRIEF IN OPPOSITION TO PETITION FOR REHEARING ON TRANSFER

I.
INTRODUCTION

Plaintiffs, with predictable histrionics, claim outrage over the decision of this Court, implying that the Court misconstrued the record and misapplied the law. However, there is nothing in their Brief for Rehearing which presents anything new that the Court, in its

lengthy deliberations on this case, has not previously considered, heard, or ultimately rejected in reaching its decision.

The majority of this Court properly concluded that if Indiana is to abide by the Restatement of Trots (2d) § 402A, then the Court's decision must follow the path it did in confirming that in Indiana the Open and Obvious Rule is an integral part of § 402A; and once having determined that, then this Court reached the only logical result it could: to enter judgment for Bemis, as a matter of law, since the evidence was uncontradicted that the *relevant* dangers were, in fact and law, open and obvious. Contrary to plaintiffs' argument, not even the dissenting opinions (with which Bemis respectfully disagrees) criticize that logical result under the rule confirmed by the majority. It is clear that the two dissenting Justices would affirm because they believe a different rule should apply.

As to plaintiffs' argument that this decision somehow departs from § 402A precedents in this state, that simply is wrong, as evidenced by this Court's extensive citation of Indiana case law supportive of the Open and Obvious Rule in Strict Liability cases. In a word, there is nothing extraordinary about this case other than the fact that it dashed plaintiffs' hope that this Court would somehow depart from settled Indiana law and the tenets of the Restatement and refuse to socially engineer a policy of Products Liability which properly rests with the Legislature.

As to plaintiffs' argument that they should still be entitled to a retrial since the Court misconstrued their theory of the case and the record, this amounts to a rather ingracious assumption that this Court has not read the Briefs or the record, or considered the argu-

ments of the plaintiffs, since each and every argument and point made in plaintiffs' Brief for Rehearing has been made time and time again in plaintiffs' Briefs before the Court of Appeals and this Court.

A reading of the majority and minority opinion of this Court demonstrates that each of these well-hashed-over legal and factual arguments had been fully considered by the Court, and that the majority properly recognized that none of them militate against the truism that the evidence elicited at the trial was absolutely uncontradicted that the *pertinent dangers* with which this case is concerned were open and obvious, as a matter of law. As will be discussed below (Part III), none of the testimony cited in plaintiff's Brief conflicts or contradicts that uncontroverted evidence, but rather plaintiffs' summary of the record merely alludes to possibilities of danger—admittedly obvious—which did not exist at a point in time relevant to this accident.

II.

THE OPEN AND OBVIOUS RULE

The nature and extent of the very thoughtful deliberations each of the Justices must have undergone in arriving at this decision is apparent, if only from reading the various opinions. It is equally apparent that the difference between the majority and the minority positions is one of legal philosophy as it pertains to the parameters of the Indiana Strict Liability Doctrine, which was made all the more poignant because of the serious injuries involved in this case.

Bemis, quite obviously, believes that the legal philosophy of the majority is correct as it merely confirms what other jurisdictions have misguidedly forgotten; namely, that the Open and Obvious Rule is an integral part of

the Restatement of Torts (2d) § 402A. As pointed out in Bemis' Reply Brief (23-36), and Bemis' Brief on Transfer (32), every state which has abandoned the rule has wittingly or unwittingly placed itself in the category of being a non-402A state; or as New York did in *Micallef v. Miehle Company*, (1976) 39 N.Y.2d 387, 348 N.E.2d 571 (which overruled *Campo v. Scofield*, (1950) 301 N.Y. 468, 95 N.E.2d 802), allows defenses to Strict Liability which § 402A would not, such as contributory negligence.

Bemis cannot improve upon the statement of Judge Pivarnik, writing for the majority, where he succinctly pointed out:

> "Hence, to be actionable under § 402A, the injury-producing product must be unreasonably dangerous, that is, dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. The harm is not actionable unless the product is 'unreasonably dangerous.' As noted above, Bemis' principal argument is that the functions of the machine were apparent, and any dangers were open and obvious to any person using it. The open and obvious rule finds support in Indiana cases and cases decided in federal courts applying Indiana law in diversity. The rule may be stated generally as follows: In the area of products liability, based upon negligence or based upon strict liability under § 402A of the Restatement (Second) of Torts, to impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product. Although the manufacturer who has actual or constructive knowledge of an unobservable defect or danger is subject to liability for failure to warn of the danger, he has no duty to warn if the danger is open and obvious to all." (Slip opinion, pp. 6-7)

Plaintiffs' assertion that the majority opinion is contrary to established principles of Strict Liability law in Indiana (Plaintiffs' Brief, pp. 6-19) is incorrect. None of the cases plaintiffs cite in their Brief on Rehearing in support of that argument negated the open and obvious concept. Those cases are only irreconcilable with this opinion if one misguidedly focuses on the openness of the physical characteristics of the product involved, as plaintiffs do here and did in their prior Briefs, instead of analyzing the *operative dangers.*

Thus, *Conder v. Hull Lift Truck, Inc.*, (1980) ..... Ind. App. ....., 405 N.E.2d 538 (petition for transfer pending), clearly recognized the underlying concept when, as appears in plaintiffs' own quotation, the court said: "The idea is to protect the normal safety expectations of the typical consumer."

Also, *Gilbert v. Stone City Constr. Co., Inc.*, (1976) Ind. App., 356 N.E.2d 738, reh. den. (1977), is not irreconcilable with the majority's opinion. Contrary to plaintiffs' contention here and in the Court of Appeals, the reversal was not because the physical characteristics of the road roller were obvious, i.e. how it looked, but because the danger of the road roller being *in movement* had a blind spot to the operator, which was *not open and obvious to a plaintiff bystander.*

The same must also be said of *Craven v. Niagara Mach. & Tool Works, Inc.*, (1981) Ind. App., 417 N.E.2d 1165 (petition for transfer pending). Whatever else one says about the opinion, it is clear that the appellate court recognized the principle of law established by this Court. At page 1169, the court said:

> "However, where the danger or potentiality of the danger is known or should be known to the user, the duty does not attach. The article sold must be

> dangerous (without the warning) to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community (of users) as to its characteristics."

More importantly, the appellate court did not reverse because "the physical characteristics of the machine were open" (that the punch press performed an impacting function—plaintiffs' Brief, p. 13). The case was reversed because there might be a factual issue as to whether there was an adequate warning to use safety blocks to prevent an *unexpected* descent of the ram on the press. That is a far cry from the expected and known descent of the shroud in this case.

Plaintiffs' purported concern over the effect of this Court's decision on the high voltage electricity cases (p. 17) is a good example of their improper approach to the case law. Of course, everyone knows that live electricity is dangerous, but that was not an issue in these cases. In both *Petroski v. Northern Ind. Pub. Serv. Co.*, (1976) Ind. App., 354 N.E.2d 736, and *Moore v. Federal Pac. Elec. Co.*, (1980) Ind. App., 402 N.E.2d 1291, the appellate courts reversed because those courts perceived there was evidence that the danger was not obvious. Both plaintiffs in those cases presented evidence that they and others might think that the lines were not live or were safe.

So, too, in *Reliance Insurance Co. v. Al E. & C. Ltd.*, (7th Cir. 1976), 539 F.2d 1101, while it is true, as plaintiffs contend, that the configuration of lifting trunnions may have been obvious, the simple fact is that the danger associated with using a choker hitch to lift the "cold box" was not.

Lastly, as to plaintiffs' reliance upon *Meadowlark Farms, Inc. v. Warken*, (1978) Ind. App., 376 N.E.2d

122, as pointed out in Bemis' Reply Brief in the Court of Appeals (p. 23), it is not a products liability case but a negligence action against the owner of an auger; and the evidence in that case was such that a jury could have concluded the danger involved was not obvious.

In short, each of these Indiana cases and, of course, the ones previously cited in Bemis' prior Briefs, establish unequivocally that the Open and Obvious Rule is part and parcel of § 402A and that the Indiana case law has always recognized that. Interestingly, one very important case which has been handed down by this Court since the filing of the initial Briefs and was mentioned in oral argument by Bemis before this Court is nowhere to be found in plaintiffs' Brief for Rehearing. Of course, that case is *Shanks v. AFE Industries, Inc.*, (1981) Ind. App., 416 N.E.2d 833. This omission is, of course, explainable, as this Court's decision in that case is the very embodiment of the underlying philosophy of the Open and Obvious Rule in products cases.

As indicated, the only way that plaintiffs can possibly construe any of these Indiana cases as negating the Open and Obvious Rule is to misguidingly fixate attention merely upon the obvious physical characteristics of a given product. Plaintiffs did this in the Court of Appeals and before this Court. Bemis pointed out in the Court of Appeals (Bemis' Reply Brief, p. 20), that this is not the relevant inquiry. The relevant inquiry focuses on the *causal* dangers and asks if they were open and obvious; not how the product looked. In other words, it is the way that the product functions which must be apparent and that the dangers therefrom are open and obvious. As discussed below (Part III), it is also this improper analysis which forms the basis for plaintiffs' assertion that there was a fact issue on open and obvious.

The only other argument plaintiffs make in their Brief for Rehearing, seeking to abolish the Open and Obvious Rule, is the now-hackneyed comment made primarily by purported products liability experts in various treatises inside and outside this state; to wit: that the rule will encourage the manufacture of obviously dangerous machines. Of course, this argument also appears to be of concern to the dissenting Justices, and it was repeatedly advanced by plaintiffs in prior Briefs. The simple legal answer to this is as Bemis pointed out in its initial Appellants' Brief (p. 80). This is a legislative decision and not a judicial one. As the court said in *Campo, supra*:

> "To impose upon a manufacturer the duty of producing an accident-proof product may be a desirable aim, but no such obligation has been—or in our view, may be—imposed by judicial decision." 95 N.E.2d at 804

Also, there is absolutely no factual basis for an inference that the abolition of the Open and Obvious Rule would encourage misdesign. In fact, that argument flies in the face of economic sense. A manufacturer has little or no economic incentive to produce a machine that is highly and obviously dangerous where a danger can feasibly be designed out at a reasonable price. Pressures of competition will force the manufacturer to do so, especially in the case of industrial machinery like the Batt Packer because of the advent of OSHA. The manufacturer of an obviously dangerous machine which can be feasibly guarded (but is not) could literally find no market for such a machine among its industrial customers who are employers required by law to guard their machines or face substantial fines.

Perhaps the best answer to the concern expressed by the commentators and dissenting Justices is provided by

the reported cases of this nation, while the Open and Obvious Rule was unquestionably a part of the Products Liability jurisprudence of every jurisdiction. Those decisions reflect that the clear trend has been toward making better and safer products. Also, it cannot be forgotten that the development of the "State of the Art" defense in products cases is a direct result of judicial recognition of this fact. In other words, there is simply not a scintilla of evidence to suggest the Open and Obvious Rule will encourage the design of ki..er machines. In fact, history and common sense dictate to the contrary.

In summary, Bemis submits that this Court's decision in this case was eminently proper and well considered, and the matter should not be reheard.

III.

THE EVIDENCE WAS UNCONTROVERTED THAT THE DANGERS WHICH PURPORTEDLY CAUSED THIS ACCIDENT WERE OPEN AND OBVIOUS, AS A MATTER OF LAW

Recognizing that the inevitable result of the Court's application of the Open and Obvious Rule would be a direction to enter judgment in favor of Bemis, the plaintiffs' primary thrust in the Brief for Rehearing is that there was a jury issue as to the openness and obviousness of the danger complained of. This Court knows that is wrong and, moreover, knows that plaintiffs' assertion that this Court misunderstood plaintiffs' theory and misread the record is also wrong.

The facts in this case admit of but two possibilities of how the accident occurred. Either Mr. Rubush placed his hand under the bag clamps as he pushed the bag clamp button bringing the bag clamp down on his hand and the shroud down on his head; or the accident simply

did not occur that way at all, but somehow Mr. Rubush positioned himself under the shroud after he activated it himself during its descent. In either event, Bemis is entitled to judgment, as a matter of law, since the danger of getting one's hand caught in the bag clamp *and* of being under the shroud during its descent for whatever reason was uncontrovertedly open and obvious.

There is nothing in the majority opinion which even suggests a misunderstanding of plaintiffs' theory or of the record. In fact, the opinion establishes the contrary. The lengthy recitation of the facts contained in the majority opinion clearly reflects that this Court actually went to the record and simply chose not to rely upon plaintiffs' *interpretation* of it. The Court's recitation correctly recites exactly what was in the record and correctly concludes that those facts lead to but one inexorable conclusion—that the dangers—the allegedly causative dangers of the way this machine functions—were open and obvious according to all of the witnesses, lay and expert, and all of the other photographic, graphic, and demonstrative evidence.

As to the assertion that this Court misunderstood plaintiffs' theory, Bemis must simply point out that this is hardly plausible, since the very same theories were advanced by the plaintiffs in the Court of Appeals and in this Court. Although Bemis disagrees with plaintiffs' assertion that this case was tried on the theory that there was a latent defect (the trial transcript reflects they did not have to after the trial court's ruling during voir dire, and that they could not because of the testimony), it is nevertheless clear that from plaintiffs' first Appellees' Brief they began to conjure up their hidden defect theory. Fearing that they would be bound by the trial testimony of their own lay and expert witnesses establishing, without conflict, that the danger of getting

one's hand caught in the bag clamp and the danger of being under the descending shroud were open, obvious, and patent, plaintiffs developed their "hidden trap" theory, which is boiled down to a nutshell on page 11 of their Brief for Rehearing:

> "In a similar fashion, the fact that, upon reflection one might recognize that the bag clamps clamp, and the shroud begins its inevitable descent once the bag clamp button is activated, does *not* mean that Gary Rubush knew and appreciated the danger. . . . It does *not* mean the inherent danger arising from the *automatically* descending shroud was open and obvious." (Plaintiffs' emphasis)

It is interesting to note that plaintiffs' concern with *their own* trial testimony regarding the obviousness of the operation of the bag clamps in conjunction with the shroud operation led them to assert in their Appellees' Answer Brief that those were *not* the "inherent dangers" with which the Court of Appeals should be concerned:

> "The dangers inherent in the Bemis batt packer are *not* that the bag clamps clamp down or the shroud descends or that a seven foot slab of steel (shroud) likely will crush anything in its path before reaching its horizontal rest position. Rather, *the dangers relate to the possibility of a worker being accidentally 'caught' within the so-called zone of danger during the shroud descent.*" (Appellees' emphasis, Answer Brief, p. 41)

Yet in their Brief for Rehearing, plaintiffs apparently claim that the latent defect is that the bagger's attention is directed away from this hitherto non-inherent danger toward the bag spout. The salient point still remains, however, that this is prior to the bagger's own activation of the danger of the descending shroud; whether that danger be denominated by plaintiffs as being "inherent" or "non-inherent," it was an obvious danger, and the danger that caused this accident.

Of course, the additional incongruity of plaintiffs' argument is that if the bagger's attention is directed to the spout, it must also be directed to the "hidden trap" of the bagger's hands getting caught on the spout by the bag clamp.

In any event, ignoring for the moment that no one testified that it was necessary or logical for a bagger to have his hand *under* the clamp in the one and one-half inch clearance before, during or after activation of the shroud, the evidence is absolutely uncontroverted that the only time a bagger would have his hands "around the spout" was when he was putting the bag on the spout prior to his own activation of the clamps and shroud at a point in time when the shroud was locked up. Also, as will appear below, contrary to plaintiffs' summary of the record suggesting that a bagger would have his hands "around the spout" at the time he activated the shroud, the undisputed evidence was that if a bagger had his hand on the bag at all it was only until the moment he pushed the bag clamp button—*and at a location on top of the bag near its middle, at a point on the bag far removed from the bag clamps and spout* (Tr. 1153-1156, 1176, 1183-1184, 1187-1188). This bears emphasis, since it must be recalled that according to plaintiffs' theory, the reason Rubush's head was under the descending arc of the shroud after it was activated by him was because his hand got caught under the bag clamp when he activated the bag clamp button. In short, the supposed danger of one's hands near the spout and clamps at the time the bagger activated the shroud was a possibility that never occurred at or after activation of the obviously dangerous descent phase of the shroud.

The simple fact is that those witnesses who said that they might hold the bag in place until they activated the

shroud descent, all uncontrovertedly testified that they would be holding the bag *at a point far removed from the bag spout and bag clamps.*

This becomes at once apparent when one reads the actual record, including the testimony of plaintiffs' witness, Don DeLay, which is quoted (but not without significant omissions) in plaintiffs' Brief on Rehearing on pages 39-43. This becomes understandable by supplying the omissions in plaintiffs' quotation of DeLay's testimony at page 41 of plaintiffs' Brief:

"Q Of course then when you push that bag clamp button, the bag clamp comes down immediately doesn't it?

A Yes.

Q That is when you take your hand away?

A Yes.

Q And that is when the shroud comes down?

A Yes.

Q *And that is when you are clear of the shroud, when it comes down*?

A *Yes.*" (Omitted testimony underscored) (Tr. 1189)

The remainder of plaintiffs' quotation of DeLay's testimony on page 42 of their Brief omits the acknowledgement of Mr. DeLay that there was no point to stay holding the bag after that point when the bag clamp set (Tr. 1192, lines 4-8), and that he knew as a bagger that when you hit the bag clamp button, the shroud immediately begins its descent (Tr. 1193, lines 5-11).

The suggestion in plaintiffs' Brief and all prior Briefs that a bagger's hand would be "around the spout" near the bag clamp at the time he pushes the bag clamp button and the concern that suggestion created among the dissenting Justices is also negated by the record by the

testimony of every other bagger who testified for the plaintiffs.

Even plaintiffs' quotation of Mr. DeLay's testimony at pages 40 and 41 of their Brief shows DeLay made clear that he would be holding the bag "*in the middle*" (plaintiffs' Brief, p. 40), off the spout, away from the bag clamps (plaintiffs' Brief, p. 41).

Plaintiffs' witness, Gary Mackey, plaintiff's co-worker, also made this abundantly clear:

"Q All right, where do you put your hand on top of the bag?

A Oh about two foot back.

Q *Two foot back from what?*

A *From the bag clamp.* (Tr. 1153)

* * * * *

Q And your hands when you were holding it like that would be approximately two feet in this direction away from the bag clamp is that correct?

A Yes, sir.

Q *Is there any reason why you keep your hands so far away from the bag clamps?*

A *You don't want to get your fingers in it.* (Tr. 1154)

* * * * *

Q At the time you pushed the bag clamp button, do you straighten up to push it?

A You are usually bent over, holding the bag up, *but not under the shroud*, you usually got *your arm under it though.*

Q *Your head is not under it?*

A Not usually.

Q *As a matter of fact your head can't be under it, because you are pushing the button, but your arm may be isn't that right*?

A *That's right.*

Q All right at the time you pushed that button, and the shroud begins to come down, do you have time to get your arm out?

A Yes.

Q Plenty of time to do that as a matter of fact?

A You got time to get it out." (Tr. 1155-56) (Emphasis added.)

So, too, another of plaintiffs' witnesses, William Dalby, who also worked as a bagger, testified that when he held the bag it was the "*tail of the bag*" that he held, which he described as follows:

"Q That means the bottom on it.

A Right.

Q *Then of course at that point you were holding the tail you were quite a distance removed from the bag clamp area are you not*?

A Yes you approximately be in the *middle* of the—

Q —Be about back in this area?

A *At the bottom the bag, yes.*" (Tr. 1202) (Emphasis added.)

Also, plaintiffs' witness, Mr. Virgil Mahoney, Mr. Rubush's foreman, when questioned about the location on the bag where one would hold it up, testified following the quotations set forth on pages 37 and 38 of plaintiffs' Brief to the following:

"Q We have heard testimony here of your instructions. We have heard testimony here of other people that hold the bag, at a point on top of the bag *away from the clamps*?

A *Yes, behind the clamps. Now you don't hold onto the clamps.*

Q I understand that, that's my question. You don't hold onto the clamps?

A *No way would I allow a man to hold his hand under the clamps.*

Q Especially when he's getting ready to push the bag clamp button.

A Right. Yes." (Tr. 1303-1304) (Emphasis added.)

Moreover, despite hypothesizing possibilities of baggers having their hands at the bag clamp when activating the shroud, both of plaintiffs' experts, when reminded of the actual testimony of the workers about where the bag is held confirmed this fact. Dr. Fox testified:

"Q All right, now if you attempted to correct a situation that existed, now I think somebody said in the *bottom of the bag or the tail of the bag at that point, his head would be far removed would it not from the bag clamp area*?

A It could be and it might also be involved in the area, but I guess, *if you are down at the tail of the bag, you are down at the tail of the bag, you are not under the head of the bag or wherever the mouth is.*

Q And there would be nothing under the shroud, except either an empty bag or bag filled at that point, if somebody got his head in the area, down at the foot of the bag?

A Yes, that is more or less correct." (Tr. 1555-1556) (Emphasis added.)

Similarly, Dr. Mancs, plaintiffs' other expert, testified:

"Q Now, as you watched this group of people operating the packer, did you form any opinion

as to whether or not one of the *natural movements* of the bagger was to *straighten up as he hit the bag clamp set button*?

A No. I thought perhaps *the movement was when he was still bent over* and *moving himself out of the area he hit the button.*

Q All right.

A But before he got straightened up.

Q I see. The natural movement though would have been one *of movement away from the area, as he was hitting the button* is that correct?

A *That's correct.*" (Tr. 1685-1686) (Emphasis added.)

In short, every single piece of evidence that plaintiffs set forth in their Brief for Rehearing in a desperate attempt to create a factual issue as to the open and obvious danger is evidence that does not address itself to the causative dangers in this lawsuit, whereas the testimony quoted above, and the majority's recitation of the facts does just that. There is absolutely no conflict between the testimony cited by plaintiffs in their Brief and the testimony of these same witnesses cited above. Plaintiffs' interpretation of the record, however, misleadingly transposes certain dangers to a function of the bagger that actually is not being performed at the time the supposed danger exists.

The majority correctly chose not to subscribe to that interpretation and correctly directed its attention to the testimony related to the dangers that were appropriate to the time and places involved and rightfully concluded that the causative dangers were open and obvious.

Realizing that this Court has now had three occasions in these appellate proceedings to examine the Rubushes' interpretation of the record and has chosen to reject it, Bemis nevertheless feels compelled to once again set

forth the verbatim testimony which is relevant to this inquiry and fully supports the majority's conclusion that the evidence, both lay and expert, was uncontradicted as to the openness and obviousness of the pertinent dangers and that evidence, most of it coming from the plaintiffs' experts, was, as the Court observed, tantamount, to a concession by plaintiffs that the danger was open and obvious.

As previously indicated, the facts admit of only two possibilities. Either the accident did not occur in the manner asserted by plaintiffs, or despite all objective evidence to the contrary, Gary Rubush did have his hand caught beneath the bag clamps. Of course, as the majority opinion notes, plaintiffs' experts, Dr. Manos and Dr. Fox, either did not assume that to have been the way in which the accident occurred or simply did not care if it occurred that way (Tr. 1514, 1559, and 1653) before they proceeded into a sea of testimonial speculation about the various dangers they perceived with this Batt Packer, which are cited at length in plaintiffs' Brief on Rehearing. Bemis has no quarrel that they testified to those dangers. However, it is strikingly clear that each of the experts readily admitted the dangers were obvious and patent.

Specifically, Dr. Fox, one of Rubush's expert witnesses, specifically acknowledged the obviousness of the danger to a bagger in the following testimony:

"Q I see, all right, one who has had some experience in operating this packager, knows when he pushes the bag clamp button, does he not that the bag clamp should come down? It is *nothing that is hidden or is secret is it*?

A *No*

Q That is *apparent* in quite the part of it?

A That's right.

Q Would you say that that would be a *dangerous* thing to do to *leave your hand* under the bag clamp when you push the bag clamp button?

A *Obviously.*

Q Would that be a *danger* that would be *known to a bag man*?

A *I'm sure.*

Q Now in that same regard, the bagger knows does he not that when he *pushes the bag clamp button*, that not only does the bag clamp come down *but the shroud comes down*?

A *Yes.*

Q It happens directly in front of him does it not?

A Right

Q It is something that *he automatically knows* that when he activates that button the *shroud is going to come down* within that same cycle?

A *Yes*

Q He knows he doesn't have to do anything else doesn't he?

A That's right. (Tr. 1517-1518)

* * * * *

Q Now, is there any reason that relates to the requirements of ones job that he would attempt to get back in the area under the shroud after he had pushed the bag clamp button, while it was in descent?

A Well, as we have said before, that is *dangerous to do, and one would not do it I wouldn't think for any reason*? . . . (Tr. 1550)

A Well basically the risk that the machine could come down while he was there exists. *It is patent*, and can be guarded against, and it's a defect in design not to do so." (Tr. 1559) (Emphasis added.)

Dr. Manos, the other expert witness of the plaintiffs, also gave the following testimony on the obviousness of the danger:

"Q —Of course a *bagger knows* does he not that when he pushes the bag clamp button the clamp is going to come down?

A Yes.

Q That is something that is *visable (sic) and obvious* is that not right sir?

A *That is correct*

Q Then that does not come as a surprise to him?

A No, sir." (Tr. 1680)

Continuing on Tr. 1687:

"Q All right. And it is *obvious to anybody* that worked that thing for more than a few minutes *when he pushes the bag clamp* button, that during that cycle the *shroud is going to come down*?

A This is a *known fact, yes.* But it is a voluntary fact or not a voluntary action on the part of the—

Q —Well, the *start of the cycle is voluntary* isn't it?

A *Yes.*

Q And he can take time to assure that he is out of the area before he activates the shroud isn't that also correct?

A Yes, sir.

Q And that is up to his judgment and his judgment alone. Isn't that also correct. That when he activates that cycle?

A Yes." (Tr. 1687) (Emphasis added.)

Clearly, plaintiffs' own experts have bound them to the proposition that any bagger knows that when he

pushes the bag clamp button the shroud will begin its descent and that descent of the shroud was an open and obvious danger, despite plaintiffs' present attempt to now argue that it was a latent danger. Plaintiffs should not be heard to refute the testimony of their own expert witnesses, and as will be discussed below, their own lay witnesses.

Specifically, each of the lay witnesses called by the plaintiffs, who were actually co-workers of Gary Rubush and had experience working the baggers, testified to the same effect.

Again, Gary Mackey, plaintiffs' witness and a co-worker of Rubush, testified that when bagging the machine, he would hold the top of the bag approximately two feet from the bag clamp, and that the reason he kept his hands so far away from the bag clamp was because "you don't want to get your fingers in it" (Tr. 1154). He also testified that it was apparent that the clamps came down when the bag clamp set button was pushed and that the bag clamps and the shroud are activated together. (Tr. 1154 and 1155). Plaintiffs' witness Don DeLay, upon whose testimony the Rubushes rely so heavily, testified that as a bagger he knew that when you hit the bag clamp button, the shroud immediately begins its descent (Tr. 1193).

As succinctly put by another plaintiffs' witness and a co-worker of Mr. Rubush, Mr. William Dalby:

> "Q . . . [D]id you ever have any occasions when you were operating the bagger on BP 19, and BP 18, where you actually had your hand underneath it [the bag clamp] at the same time you pushed the bag clamp set button?
>
> A Well, if you had your hand underneath it when you pushed the button *you would get your hand caught.*" (Tr. 1201) (Emphasis added)

Also, Mr. Virgil Mahoney, who was Rubush's foreman and was called as a witness by plaintiffs, testified:

"Q So as you started to say then sir, what your testimony is, that there isn't any function for the bagger when it fills, where his hand is actually under the clamp—

A There would be no reason. There would be no reason in the world for a man to put his hand near the clamp. It would be contrary [to] safety instructions." (Tr. 1304)

This telling fact was also elaborated on in Mr. Mahoney's further testimony:

"Q All right, can a *trainee be typically* be told to *keep his fingers out from under the bag clamp*? When he is getting ready to push the bag clamp button.

A Yes.

Q That is something that every trainee is told also?

A Yes. (Tr. 1262) (Emphasis added.)

* * * * *

Q Well, you were certainly *aware of the fact* that when you pushed the bag clamp button, the bag clamp immediately came down, is that correct?

A Yes, *I am aware* of that.

Q Would that be something that would also be passed on to a trainee?

A Yes. (Tr. 1262-1263)

* * * * *

Q All right, now in addition to that where a bagger is operating, right handed bagger or left handed bagger, he is facing this area is he not?

A Yes he is facing the area, yes.

Q The shroud comes down right in front of him doesn't it?

A Yes

Q All right, nothing obstructing his view is there?

A No

Q All right, when you push that bag clamp button the bag clamp set comes down does it not sir?

A Yes

Q Now, those are things that somebody who had any experience operating would know, would he not sir?

A Yes. (Tr. 1323-1324)

* * * * *

Q *He knows does he not*, he is trained when he hits the bag clamp button, that *the bag clamp comes down*?

A Yes

Q He knows when he hits that *also the shroud comes down*? Isn't that right?

A Right

Q And the shroud comes down *right in front of him doesn't it*?

A Yes." (Tr. 1324-1325) (Emphasis added.)

Lastly, Rubush's own deposition, taken approximately a year before trial, clearly reflects his understanding of the manner in which the machine operated and the obviousness of the dangers involved. Although it is true that Mr. Rubush testified at trial he could not recall the facts and circumstances surrounding the incident itself, in his deposition he was able to elaborate at great length upon the normal operating procedures he would follow when acting as a bagger:

"Q Well, do you have to push some button in order to bring the bag clamp down?

A Yes. You have to push the bag clamp button to get it down.

Q Okay. And then *when you push the bag clamp button down what happens*?

A *The shroud comes down. . .* (Tr. 2005)

* * * * *

Q Do you know whether you were injured on the press that would have been to your right as you face the presses or to your left as you face the presses?

A It would have been to my right.

Q To your right.

Which hand would you press the button with to set the bag clamp on the right press?

A It wouldn't matter which press I was on. *I always would use my left hand. . .* (Tr. 2026)

Q Now, after you press the button to set the clamp or at the time you press that button to set the clamp do you have to stand straight up?

A *I would by using your left hand.*

Q Now, if you were standing straight up pushing the bag clamp set button with your left hand would your head be out of the area where the shroud comes down on the right handed press, the one you got hurt on?

THE WITNESS: Would it be out of your—I mean.

Q Would your *head and body be out of the area where that shroud comes down*?

A Yes. *If I used my left hand it would have been.*

MR. KALLERES: Okay.

MR. HOLLAND: I don't know that I understood that question and answer, could we have that back.

Read back.

Q Now, during that period before you would have pushed the bag clamp set button with your left hand where would your head and body have been?

THE WITNESS: Before you push the button?

MR. KALLERES: Yes.

MR. HOLLAND: Excuse me. Are you asking in general, Art. You're not saying on that night? Because obviously he doesn't recall exactly.

MR. KALLERES: I'm asking typically the way *he operated* the press in the past.

MR. HOLLAND: Okay.

MR. KALLERES: Where your head and body would have been.

A Like this is the bag clamp. You'd be putting the bag on. Then your head would be over the edge of it.

Q At that time where would your head be? Under the area where the shroud comes down?

A Yes.

Q Now, when you are in this position am I correct that all you do is take the bag over the snout and place it on the snout?

A Yes. You have to bend over underneath it to get it on.

Q You have to do what?

A Bend over underneath the shroud to put it on.

Q All right. Okay. *And then it's right after you do that that you stand up and push the clamp set button with your left hand typically*?

A After you pull the slack out of it.

Q And it is *at that point* that *your head and body are out of the area where the shroud comes down*? Is that correct?

A *Yes.*" (Tr. 2028-2030) (Emphasis added.)

The record speaks for itself. Nothing more need be said other than to observe that since each of plaintiffs' witnesses, including plaintiffs' own experts, concedes that the danger of getting one's hand caught under the bag clamps and the danger of being within the arc of the shroud during its expected descent after pushing the button, was open, obvious, and patent danger, then plaintiffs are bound by that testimony if the accident happened that way. If that is not the way the accident occurred, or if, as Dr. Manos, plaintiffs' expert, testified, there is no scientific way to determine what caused the accident (Tr. 1660-1661), the result of this case has to be the same for the danger of being within the arc of the shroud for any reason after the same person activates its controlled descent is equally obvious, according to these same plaintiffs' witnesses. In short, under either of these hypotheses, Bemis was entitled to judgment in its favor, as a matter of law, and the Court should deny Rubushes' Petition for Rehearing.

IV.

THE COURT WAS CORRECT ABOUT DR. FOX'S TESTIMONY

On page 67 of their Brief, plaintiffs claim that the majority opinion was an error in its observation that Dr. Fox, one of plaintiffs' experts, was permitted to testify over an objection of Bemis and then ultimately went on to give a definition of "unreasonable hazard" which "compounded" the prejudice arising from the trial court's failure to give Bemis' Instruction No. 3. Plaintiffs take

the position that there was no objection by Bemis to Dr. Fox's testimony and then attempt to blame Bemis for eliciting the testimony about the term in the first place. At the outset, it should be noted that plaintiffs made this same argument in their Answer Brief (p. 76) and that it was responded to in Bemis' Reply Brief (pp. 46-52). Rather than repeat Bemis' prior reply at length, Bemis will simply make a couple of pertinent observations which totally refute plaintiffs' position before this Court.

In the first instance, the Court was completely right. Bemis did, in fact, object to any testimony that Dr. Fox would give regarding his ultimate opinions as to the dangers and deficiencies of the Batt Packer because it would amount to utter speculation and irrelevancies as Dr. Fox assumed no factual predicate as to how the accident occurred (Tr. 25-27, 747-749). Thus, the record clearly reflects that the Court correctly observed that the objection was interposed by Bemis to Dr. Fox's testimony *before* he ever mentioned the term "unreasonable hazard."

Even more troublesome is Rubush's contention that Bemis was the first one who brought up the term. As pointed out on page 47 of Bemis' Reply Brief, Bemis did not even broach the subject until after the term "unreasonable hazard" and the components of Dr. Fox's definition were *elicited in the plaintiffs' direct and redirect examination of him*. The record shows on direct examination by plaintiffs' counsel Dr. Fox testified:

"Q What facts did you take into consideration in arriving at the opinion you just stated that the machine was unsafe?

A Well basically, the rather straight forward engineering principal (sic) that with regard to the safety, one needs to guard areas of danger

against the *possible* (sic) of personnel being in contact with the danger, if that's possible. . . ." (Tr. 1469) (Emphasis added.)

And during redirect examination by plaintiff's counsel, Dr. Fox stated:

"[t]he bottom line is always victim and must be protected, and you just don't make a machine that is dangerous, that exposes an individual to an *unreasonable hazard.* (Tr. 1558)

* * * * *

Q Is it relevant to you as a machine engineer, an expert in machine design, in mechanical engineering, and in arriving at your conclusions that you have arrived at in this case, as to the exact reasons by Gary Rubush was within the arc of the shroud at the time it came down that is whether it was through inadvertence or through necessity.

A No.

Q Why do you say that?

A Well basically the risk that the machine could come down while he was there exists. *It's patent and it can be guarded against* and it's a defect in design not to do so." (Tr. 1558-1559) (Emphasis added.)

After this testimony, and only after Dr. Fox used that term on redirect examination with a clear implication that his definition required guarding against *patent risks*, did Bemis' counsel properly seek Dr. Fox's definition of the term (with a reasonable expectation of highlighting the difference between Dr. Fox's standard and that which the jury would be instructed to follow under Indiana law). Bemis objected in a timely fashion before Dr. Fox began all of the objectional testimony, and when he used a term of art under questioning by his

own counsel which did not comport with the law's definition of that term, Bemis' inquiry about it was entirely proper cross-examination and, in fact, the only cross-examination possible after the court allowed the door to be opened to Dr. Fox's testimony of dangers and deficiencies. Bemis was delighted with Dr. Fox's definition of the terms he first used under his own counsel's questioning. If the court had properly instructed the jury, Bemis would still be delighted with the answer. However, the court's failure to instruct the jury as to the law's definition of "unreasonably dangerous" left the jury with the misguided belief that Dr. Fox's definition (and as the majority opinion points out, Dr. Manos' standard) were the only ones they could apply, thereby heaping yet *another* prejudicial element upon that instructional failure.

Lastly, it must be recalled that Dr. Fox's testimony merely "compounded" the prejudice arising from the trial court's refusal to define "unreasonably dangerous." Both he and Dr. Manos, over Bemis' objection, regaled the jury with their own personal standards for liability. As the majority opinion correctly points out:

> "He testified further as to ways in which the machine could have been made safer. Dr. Manos, another expert witness, testified similarly. The jury could have relied on this definition then, and determined that even though the dangerous characteristic of the descending shroud was open and obvious to Rubush as he operated the machine, and known to him, they could find Bemis liable for not conforming to the standards set by Dr. Fox and Dr. Manos. This would make manufacturers insurors of any product they put in the open market and render them liable for injuries and damages to those using the machine regardless of the facts and circumstances surrounding the injury. This is not the law in Indiana." (p. 9)

In sum, plaintiffs' claim that the majority opinion misconstrued the record is simply wrong, and their argument that somehow all of this was Bemis' fault is misleading.

V.

THE COURT CORRECTLY FOUND ERROR IN THE TRIAL COURT'S REFUSAL TO DEFINE "UNREASONABLY DANGEROUS"

On page 71 of their Brief (Part VI), plaintiffs, for the third time in these appellate proceedings, advance their argument that there was no error in the trial court's refusal to give Bemis' requested Instruction No. 3, which defined the essential element of Strict Liability that the product must be in a defective condition and unreasonably dangerous, in accordance with the Restatement. Plaintiffs present nothing new on this issue and merely repeat their prior arguments, including the argument that the Preliminary and Final Instruction No. 1 (which merely set forth Bemis' *denial* that the Batt Packer was dangerous to an extent beyond a contemplation of the ordinary bagger) fulfilled the trial court's obligation to define the term. Again, this was completely covered in Bemis' Reply Brief on pages 37-43, and Bemis will not again address the issue at length.

Suffice it to say that the trial court's advice that Bemis *denies* an element is not telling the jury that it was an essential element and that plaintiffs must prove that essential element as it is defined by law. Paradoxically, this very deficiency in the trial court's Instruction No. 1 is high-lighted in plaintiffs' Brief before this Court, where the plaintiffs point to Instructions that were given by the court that dealt with the *affirmative defense* of incurred risk (See plaintiffs' Brief, pp. 76-78). Although none of the Instructions cited by the

plaintiffs embraced the definition of "unreasonably dangerous" contained in Bemis' requested Instruction No. 3, even if they did, it would not suffice, since they placed the burden on the defendant to negate an essential element which should have been plaintiffs' burden to prove. No Instruction told the jury that; and surely the Rubushes' argument that the jury must have found that element because it was instructed on the defenses of misuse and incurred risk is beyond logic. This Court was correct.

VI.

THE COURT CORRECTLY FOUND ERROR IN THE TRIAL COURT'S GIVING OF INSTRUCTION NO. 14

The only other basis upon which the Rubushes assert the need for a rehearing is their argument that the Court improperly concluded the Court's Instruction 14 was an incorrect statement of law. Plaintiffs advance the same arguments they did in prior Briefs (Answer Brief, p. 88), which were responded to by Bemis in its Reply Brief (p. 57) and its Brief on Transfer (p. 47).

The majority opinion (p. 11) is correct. There is no other way to read Instruction No. 14 than as a requirement that in order to find for Bemis the jury had to find the Batt Packer was *not* defective or unreasonably dangerous *and* that Mr. Rubush's product was unreasonably dangerous. Accordingly, Instruction No. 14 was dead wrong.

That Rubushes are still contending that some other interpretation of Instruction No. 14 would have been placed on it by the jury is especially disingenuous in light of their interpretation of it advanced by plaintiffs' counsel during final argument where, as the Court correctly noted, plaintiffs' counsel told the jury that this

part of Instruction No. 14 applied only if they found that the Batt Packer was *not* unreasonably dangerous. (Tr. 2556-2557).

Bemis respectfully submits that this basis for rehearing is also without merit.

VII.
CONCLUSION

Bemis earnestly believes the majority opinion of the Court was devoid of any error, any misunderstanding of the record or the theories of the parties, and any misapplication of well-settled law in this jurisdiction, and therefore, plaintiffs' Petition for Rehearing should be denied. Other than the fact that there are and will be few product liability cases in which *all* of the testimony will so uncontrovertedly establish that the dangers involved were open and obvious to any user of the product, this case presents nothing unique. The majority, in straightforward reading of the Indiana product liability case law, correctly concluded that the Open and Obvious Rule was an integral part of it; and given the trial record before it, which the Court correctly considered, the majority reached the only decision possible—to enter judgment for Bemis, as a matter of law. Accordingly, plaintiffs' Petition for Rehearing and Oral Argument should be denied.